

1 FEDERAL TRADE COMMISSION

2 I N D E X (PUBLIC RECORD)

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4 WITNESS: DIRECT CROSS REDIRECT RECROSS

5 Bazerman 8473 8552 (US)

6 8582 (SP)

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8 EXHIBITS FOR ID IN EVID

9 Commission

10 None

11 Schering

12 None

13 Upsher

14 None

15 OTHER EXHIBITS REFERENCED PAGE

16 Commission

17 CX 755 8492

18 CX 1768 8498

19 CX 1769 8497

20 CX 1770 8535

21 CX 1771 8536

22 CX 1790 8549

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FEDERAL TRADE COMMISSION

In the Matter of:)
SCHERING-PLOUGH CORPORATION,)
a corporation,)
and)
UPSHER-SMITH LABORATORIES,) File No. D09297
a corporation,)
and)
AMERICAN HOME PRODUCTS,)
a corporation.)
-----)

Friday, March 22, 2002

10:00 a.m.

TRIAL VOLUME 36

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Susanne Bergling, RMR

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Good morning, everyone.

4 ALL COUNSEL: Good morning, Your Honor.

5 JUDGE CHAPPELL: Let's go back on the record,
6 docket 9297.

7 Just a couple things here before we take the
8 next witness. I have been scouring my files downstairs
9 to make sure that I've caught all pending motions. I
10 understand we've got the motion to dismiss pending.
11 Other than that, if there are any other motions that
12 haven't been brought to my attention that are pending,
13 today is the time to do that.

14 I've seen a couple things that have gone on on
15 what I call the second front. They are being filed
16 downstairs while we're up here, but I've tried to catch
17 everything and deal with it as we've gone along. So, I
18 just wanted to put that out to let you know I'd like to
19 be told today if you know of anything pending other
20 than the motion to dismiss.

21 Also, yesterday when I was pointing out in your
22 post-trial briefs, when you refer to in camera
23 material, it must be put in brackets or highlighted,
24 and just to be clear, the reason I need that is if I
25 want to cite your reference in my decision, I need to

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1 know it's in camera, because I have to file two
2 decisions. And just -- the reason I brought it up
3 again, I wanted you to know there is a rule, 3.45(e),
4 as in echo, that also requires that.

5 Any questions?

6 MS. BOKAT: No, Your Honor.

7 MR. NIELDS: No, Your Honor.

8 MR. CURRAN: No questions, Your Honor, and I'm
9 not aware of any pending motions, although it occurs to
10 me that there's a possibility that we filed a motion
11 for in camera for something that's come up during
12 trial. I'll look into that to see if that's still
13 pending.

14 JUDGE CHAPPELL: I know there was one that was
15 unopposed that had some glitches that needed to be
16 amended, and my attorney-advisor should have contacted
17 someone on that. It was unopposed.

18 Does anyone object to my attorney-advisor
19 contacting Mr. Curran's office? This was an unopposed
20 motion regarding some exhibits that came up in the last
21 couple of weeks.

22 MS. BOKAT: Complaint counsel does not oppose
23 that contact.

24 MR. NIELDS: Nor do we, Your Honor.

25 JUDGE CHAPPELL: If it hasn't been done, I'll

1 have her contact someone at your office. I can recall
2 looking at a motion, and I had forgotten about that
3 motion in limine, but there was a discrepancy between
4 the exhibit numbers on your motion and in the
5 declaration.

6 MR. CURRAN: Very good, we will look into that
7 right away, Your Honor.

8 JUDGE CHAPPELL: It was probably more than a
9 technicality. I have to rely on the declaration.

10 MR. CURRAN: Very good.

11 JUDGE CHAPPELL: So, other than that, anything
12 else?

13 Next witness?

14 MR. KADES: Your Honor, complaint counsel calls
15 Professor Max Bazerman to the stand.

16 JUDGE CHAPPELL: Raise your right hand, please.
17 Whereupon--

18 MAX H. BAZERMAN
19 a witness, called for examination, having been first
20 duly sworn, was examined and testified as follows:

21 JUDGE CHAPPELL: Thank you, have a seat.

22 State your full name for the record, please.

23 THE WITNESS: Max Hal Bazerman.

24 JUDGE CHAPPELL: Thank you.

25 MR. CURRAN: Your Honor, Mr. Gidley is

1 responsible for this witness for Upsher-Smith.

2 JUDGE CHAPPELL: Mr. Gidley behind the monitor?

3 MR. GIDLEY: Yes, Your Honor, good morning.

4 JUDGE CHAPPELL: Go ahead, Mr. Kades, whenever
5 you're ready.

6 MR. KADES: Thank you, Your Honor, and good
7 morning.

8 JUDGE CHAPPELL: Good morning.

9 DIRECT EXAMINATION

10 BY MR. KADES:

11 Q. Good morning, Professor Bazerman.

12 A. Good morning.

13 Q. Professor Bazerman, what is your profession?

14 A. I'm a professor at Harvard Business School at
15 Harvard University as well as having affiliated
16 appointments with the Program on Negotiation in the
17 Kennedy School of Government and the Psychology
18 Department at Harvard.

19 Q. Do you have any particular fields of expertise?

20 A. I believe I'm an expert in decision making,
21 negotiation, dispute resolution and the application of
22 those areas to government laws and regulations.

23 Q. And in your work, what academic fields do you
24 rely on in your research and your teaching?

25 A. I work on decision making and negotiation that

1 heavily draws on psychology and economics.

2 Q. Have you published in the leading journals
3 of -- in the field of economics and psychology?

4 A. I have published in the leading journals of
5 both of those fields.

6 Q. Are you married?

7 A. I am.

8 Q. And for how long have you been married?

9 A. It will be 23 years ten days from now. Same
10 person.

11 Q. Just one person?

12 A. Just one person.

13 Q. Okay. Professor Bazerman, are you prepared to
14 render rebuttal expert -- let's try that again.

15 Professor Bazerman, are you ready to render
16 expert rebuttal opinions in the areas of negotiations,
17 the economic analysis of negotiation and
18 decision-making biases?

19 A. I am.

20 Q. And before we get to those opinions, I want to
21 go into your background in a little more detail.

22 What specific courses do you teach at Harvard
23 University?

24 A. I currently -- well, I just completed teaching
25 the first year MBA required course on negotiations, and

1 I'm also the co-course head of that course for the 11
2 sections of the -- in the MBA curriculum. I'm the
3 course head of a program called Changing the Game,
4 which is a program on decision making and negotiation
5 that executives take. Approximately 60 to 80 show up
6 twice a year to take that -- to take that course.

7 I teach in the executive program of the Program
8 on Negotiation. I teach in a variety of other
9 executive programs, and I teach a doctoral seminar on
10 decision making and negotiation.

11 Q. And in the -- you're a member of the Department
12 of Negotiations?

13 A. I'm in the Department of Negotiations,
14 Organizations and Markets at the Harvard Business
15 School as my primary appointment.

16 Q. And what fields are your colleagues -- what
17 fields do your colleagues in that department specialize
18 in?

19 A. The majority of the department are economists
20 by background, and there are a smaller number of
21 individuals who work in related social sciences but
22 have considerable expertise in economic analyses,
23 particularly economic analyses of negotiation.

24 Q. And do you do any teaching or training outside
25 the context of being a professor at Harvard University?

1 A. I do.

2 Q. Tell us what type of teaching and consulting
3 you do.

4 A. Over the last 15 years, I've spent
5 approximately 25 to 30 days a year working for
6 corporations. Probably the most common activity that I
7 engage in outside Harvard University is to teach
8 customized programs on negotiations for specific
9 corporations, and pharmaceuticals is certainly the
10 industry that has used my courses most often.

11 Q. And what sort of -- when you teach executives
12 outside the context of your academic work, what sort of
13 course work are you -- what are you teaching them?

14 A. I'm teaching them to think about negotiations
15 in more systematic ways, to understand basic economic
16 principles as they apply to negotiation, and to be
17 aware of psychological biases that could impede their
18 effectiveness in negotiation.

19 I also sometimes teach courses on decision
20 making, but certainly more on negotiation than on
21 decision making, and my negotiation work often has a
22 decision focus to it.

23 Q. And these courses that you teach executives, is
24 it just a matter of you coming in and lecturing them or
25 how does it work?

1 A. No, the predominant mode that I use in teaching
2 executives is an experience-based approach, so it's
3 very common in the courses that I teach to send
4 executives off to work on a simulated negotiation, and
5 they bring back their results. We typically post them
6 on flip charts or the blackboard, and we use their
7 results to identify what works, what doesn't work,
8 where there's opportunities to be more effective, and
9 then I develop the conceptual frameworks for them out
10 of their data essentially.

11 And then as we move through a program, it's
12 quite common to move into some part of the course where
13 we apply the principles from the course to a variety of
14 real world negotiations that these executives or
15 managers are currently facing.

16 Q. And over the course of your time when you've
17 been doing this consulting work, what sort of real
18 world decisions have you discussed with executives?

19 A. Working with perhaps 20,000 executives over the
20 last 15 years in the classroom, it runs the whole
21 gamut, but it would certainly include negotiating over
22 purchasing goods, negotiating over selling goods,
23 negotiating mergers, negotiating licenses, negotiating
24 strategic alliances, negotiating within the firm, the
25 whole gamut of decisions that managers and executives

1 encounter where they're making decisions with another
2 individual that doesn't have the same exact preference
3 that they have.

4 Q. I'd like to turn back to your academic
5 experience, and what sort of research have you done in
6 the course of your career regarding negotiations?

7 A. The predominant empirical research -- that is,
8 research where data's at the core of the research -- is
9 experimental or simulation-based research where we
10 create a simulation based on some real world story
11 typically, and for research purposes, what we commonly
12 do is we'll take the exact same story, but we'll
13 manipulate one -- perhaps one, sometimes two variables,
14 but if we're manipulating one variable, what we would
15 be doing is having some dyad, some pairs of negotiators
16 negotiating under one condition, and another group of
17 negotiators randomly selected work on the same problem
18 but just with one variable manipulated, not unlike what
19 pharmaceutical firms would do in terms of clinical
20 trials.

21 Q. And what's been the result of this -- of your
22 research?

23 A. My research -- the biggest chunk of my research
24 has developed the field of negotiation with a focus on
25 the decision errors that even smart negotiators seem to

1 make on a fairly regular basis. So, my -- the modal
2 concepts that I would focus have included the category
3 of decision-making in the context of negotiation.

4 Q. I'd like to turn a little bit to your
5 educational and professional background. When did you
6 graduate from college?

7 A. I received my undergraduate degree from the
8 University of Pennsylvania in 1976.

9 Q. And what was your major?

10 A. Accounting and organizational behavior.

11 Q. And where did you receive your Ph.D. from?

12 A. From Carnegie Mellon University.

13 Q. What year was that?

14 A. I finished it in late '79, and I think I was
15 awarded the degree at graduation time in 1980.

16 Q. And what was your Ph.D. in?

17 A. In organizational behavior.

18 Q. And now, after you got your Ph.D., where did
19 you go from there?

20 A. My first teaching position when I graduated
21 from Carnegie Mellon in 197 -- when I left Carnegie
22 Mellon in 1979 was at the University of Texas at
23 Austin.

24 Q. And what was your appointment?

25 A. I was an assistant professor of management.

1 Q. How long were you at the University of Texas?

2 A. Year and a half.

3 Q. From the University of Texas, where did you go?

4 A. I went to Boston University, to the School of
5 Management at Boston University.

6 Q. How long were you at Boston University?

7 A. Two and a half years.

8 Q. And where did you go from Boston University?

9 A. From Boston University, I moved across the
10 river to MIT.

11 Q. And what was your appointment at MIT?

12 A. Assistant professor of management.

13 Q. And was that in the Sloan School?

14 A. It was in the Sloan School of Management at
15 MIT.

16 Q. And after MIT, what was your next position?

17 A. So, in 1985, I moved to the Kellogg Graduate
18 School of Management at Northwestern University.

19 JUDGE CHAPPELL: Mr. Kades, based on what I've
20 just heard, I need to disclose to the parties, I was
21 attending the University of Texas at Austin, taking
22 business courses, at the time you were there. I do not
23 recall being in one of your classes.

24 Does anyone object to that, to my hearing this
25 witness?

1 MR. GIDLEY: No, Your Honor.

2 MR. NIELDS: No, Your Honor.

3 THE WITNESS: I don't remember you either, Your
4 Honor.

5 JUDGE CHAPPELL: I just wanted to disclose
6 that. And "Hook 'Em Horns," by the way.

7 THE WITNESS: Thank you.

8 BY MR. KADES:

9 Q. I think we were at the Kellogg School?

10 A. I arrived at the Kellogg School of Management
11 in 1985.

12 Q. And what was your appointment at the Kellogg
13 School?

14 A. I arrived as associate professor of --
15 associate professor of organizational behavior in the
16 Kellogg School of Management, with tenure at that
17 point.

18 Q. And did there come a time you became a full
19 professor at Kellogg?

20 A. Two years later, in 1987, I was promoted to
21 full professor.

22 Q. Did you have any -- besides -- did you have any
23 other appointments besides being a full professor at
24 Kellogg?

25 A. In addition -- in -- two years after that, I

1 believe in 1989, I was promoted to being a chaired
2 professor. I was the J. L. Kellogg Distinguished
3 Professor starting in 1989, and somewhere along the
4 line I was also given a courtesy appointment in the
5 Department of Psychology.

6 Q. How long were you at the Kellogg School?

7 A. Between 13 and 15 years depending on how you
8 count them. I was on the faculty formally from '85 to
9 2000. The last 29 months of that, I was in two
10 different visiting positions at the Harvard Business
11 School while maintaining my appointment at the Kellogg
12 School.

13 Q. What were those visiting appointments?

14 A. I went to Harvard in April of 1998 for a
15 nine-month visit as the Ford Visiting Professor, and
16 after that nine months ended, I spent 20 months as the
17 Marvin Bower Fellow at the Harvard Business School.

18 Q. What is the Marvin Bower Fellow?

19 A. The Marvin Bower Fellow is a wonderful job for
20 an academic. Harvard Business School each year offers
21 one or two individuals the opportunity to be in
22 residence as a professor with their salary paid, with
23 their research supported and no teaching to do and no
24 meetings to attend, so it's kind of scholar at large.

25 Q. And after the Marvin Bower Fellowship ended,

1 what happened then at that point?

2 A. Toward the end of the Marvin Bower Fellowship,
3 maybe eight months before it ended, Harvard Business
4 School, Harvard University, made me an offer to join
5 their faculty on a permanent basis, and I accepted that
6 offer.

7 Q. Okay. And what's your current appointment at
8 the Harvard Business School?

9 A. I am the Jesse Isidor Straus Professor of
10 Business Administration, and I'm also a tenured, voting
11 faculty member in the Kennedy School of Government and
12 a courtesy professor of the Department of Psychology.

13 Q. Now, Harvard has a Program on Negotiations?

14 A. That's correct.

15 Q. What's your involvement in that program?

16 A. I'm both on the five-person executive
17 committee, on the somewhat broader steering committee.
18 I'm the vice-chair for research. The Program on
19 Negotiation is divided into three primary activities,
20 research, pedagogy and application, and I'm the
21 vice-chair of research.

22 And within -- within the Program on
23 Negotiation, there are a variety of sub-centers. One
24 of them is the Psychological Processes and Negotiation
25 Group, and I'm the head of that as well.

1 Q. I probably should have asked this first, but
2 what is the Program on Negotiation?

3 A. The Program on Negotiation is either the or one
4 of the leading centers of research on negotiation and
5 dispute resolution in the country, and many would argue
6 in the world, so it's housed at the Harvard Law School,
7 but it's a research center that crosses multiple
8 universities and multiple schools within Harvard.

9 Q. Is Professor Mnookin a colleague of yours?

10 A. He is.

11 Q. Professor, I'd like to now talk a little bit
12 about your publications.

13 A. Um-hum.

14 Q. What books have you published?

15 A. I've published I believe ten books. The most
16 recent book that I've published is a book called You
17 Can't Enlarge the Pie: Six Barriers to Effective
18 Government, that's my most recent book published last
19 year, and it's a book that applies the research on
20 negotiation and decision making to why we often end up
21 with suboptimal -- suboptimal government policies.
22 That's one book that I've written.

23 I've written a book called Judgment in
24 Managerial Decision Making, which is one of the leading
25 texts summarizing the area of the decision making and

1 bias perspective, which focuses on what are the common
2 errors that we make in decision making, so that book --
3 the 2002 edition came out in 2001. That was the fifth
4 edition of that book.

5 I've written a book called Negotiating
6 Rationally. I've written a book called Smart Money
7 Decisions. I've written a book called Cognition and
8 Rationality in Organizations, and I've edited five
9 other books. So, I wouldn't want to claim to have
10 written books that I edited.

11 Q. Fair enough.

12 You mentioned Judgment in Managerial Decision
13 Making. Is that used as a textbook?

14 A. It's used as a textbook at many leading
15 universities.

16 Q. And in what types of classes is it used as a
17 textbook?

18 A. It's used as a textbook in electives on
19 decision making in a number of business schools. It's
20 used as a secondary text in some courses on
21 negotiations. It's also used by a number of economists
22 who have used it to summarize the emerging area of
23 behavioral economics. It's used in psychology courses
24 as more of an applications book from the perspective of
25 psychology.

1 Q. And in your academic publications, what sorts
2 of subjects have you published articles on?

3 A. I've published work on how people make
4 decisions, specifically, what are the systematic
5 mistakes that they make. I've conducted research on
6 negotiations; decision-making processes in
7 negotiations; negotiations in the shadow of
8 arbitration, that is, how do people negotiate when they
9 face the prospect of an arbitrated decision. I've
10 published work on arbitrator decision making.

11 I've published a fair amount of work on the
12 negotiation between environmental and economic
13 interests, focusing on how do we come up with more
14 optimal trades in that kind of environment. I have
15 published work on auditor independence. I have
16 published work on consumer behavior.

17 There are probably a number of other topics,
18 but that's a good representation of the bulk of the
19 topics I focus on.

20 Q. What professional awards or honors have you
21 received?

22 A. As I was a Teacher of the Year selected from
23 the executive students at the Kellogg Graduate School
24 of Management in 1992. I was elected as a fellow of
25 the American Psychological Association, the American

1 Psychological Society, the Academy of Management.
2 Earlier in my career, I had some awards for research
3 design. The Marvin Bower Fellowship might be
4 considered an award. I was a fellow -- I was a fellow
5 at the Center for Advanced Study in the Behavioral
6 Sciences in Stanford, California where I first got to
7 know Professor Mnookin while -- those are some of the
8 awards.

9 Q. You mentioned the Academy of Management. What
10 is the Academy of Management?

11 A. The Academy of Management is a leading
12 scholarly association of professors teaching in
13 management schools.

14 Q. And what does it mean to be a fellow in the
15 Academy of Management?

16 A. That is an honorary society of people who have
17 made significant contributions to our understanding of
18 management research and management practice, and I
19 believe that there are a little more than 100
20 members -- there are a little more than 100 fellows of
21 the Academy of Management.

22 Q. Now, in your own research, have you
23 specifically done research about settlement in
24 litigation?

25 A. I have not conducted any research that

1 specifically had the question of how people negotiate
2 with litigation as a backdrop. I'm sure I've written
3 about that in a number of contexts, but in terms of
4 conducting empirical research, my research typically
5 has not had the litigation background.

6 Q. And do you think the experience in your
7 research that you've done would apply to settlements in
8 the context of the backdrop of litigation?

9 A. I certainly do.

10 Q. And tell us why you think that the concepts
11 you've studied have application.

12 A. I think most -- most of the research on the
13 economics and psychology of negotiation behavior where
14 we created a simulation where the backdrop is
15 arbitration has many of the very same characteristics
16 as negotiation under the threat of litigation, but more
17 generally, my research tries to understand basic
18 aspects of decision making and negotiation processes
19 that apply to a broad realm of negotiation activities.

20 So, my specialty as a researcher is to
21 understand basic properties of human decision making
22 and negotiation, and my consulting and my real world
23 expertise is particularly focused on how do you take
24 this and apply it to a wide variety of different real
25 world contexts, and negotiating under the threat of

1 litigation would be one of those contexts.

2 MR. KADES: Your Honor, I move that Professor
3 Bazerman be accepted as an expert in the fields of
4 negotiation, dispute resolution, the economic analysis
5 of negotiations and decision-making biases.

6 JUDGE CHAPPELL: Any objection?

7 MR. GIDLEY: Yes, Your Honor. To the extent
8 that that description includes any purported expertise
9 in the field of economics with respect to industrial
10 organization or antitrust or that that expertise spills
11 over into expertise as to what the proper decision rule
12 should be for this Court, we would object on behalf of
13 Upsher-Smith, Your Honor.

14 We would also object to the extent that this
15 expert or complaint counsel want to proffer this expert
16 as an expert in the domain of pharmaceutical licensing
17 or due diligence.

18 MR. KADES: Your Honor, we are not proffering
19 Professor Bazerman either as an expert --

20 JUDGE CHAPPELL: Well, let me just ask, just to
21 speed things up, based on what he's objected to, are
22 you narrowing your offer or are you still asserting him
23 as an expert in the areas objected to by Mr. Gidley?

24 MR. KADES: I don't think we asserted -- I
25 don't think our offer reached at least two of those

1 areas, and as to the -- which would be the industrial
2 organization and licensing realm, we were not
3 intending -- the offer was not intended to establish
4 him as an expert in those fields.

5 As to the expert on commenting on the legal
6 rule, I'm not sure I understand Mr. Gidley's objection,
7 but Professor Bazerman is not going to advise the Court
8 what the rule should be, but as other experts have
9 done, based on their expertise, comment about the
10 implications of certain types of decision rules. We
11 would say that based on his experience he is an expert
12 to -- to proffer that sort of testimony.

13 MR. GIDLEY: Your Honor, may I follow up? It
14 looks like we've already made some progress here on the
15 final objection, the objection on public policy. I
16 just want to put two points on the record.

17 The first, Your Honor, is that the decision
18 rule for this Court, the law, the application of law,
19 of course, is with Your Honor. Moreover, Your Honor,
20 this witness has testified under oath that he is not
21 skilled or capable of drafting the decision rule for
22 this case. If complaint counsel wants to agree to
23 that, then we can proceed. Otherwise, I would ask for
24 a voir dire.

25 MR. KADES: Your Honor, I think we would agree

1 that Professor Bazerman's not here to draft a rule, but
2 stating again that we think he is an expert to comment
3 on the implications of rules based on his expertise.
4 So, I think we have agreement.

5 JUDGE CHAPPELL: Mr. Nields?

6 MR. NIELDS: Your Honor, I think I'm sort of
7 late. All I'm going to do is agree with Mr. Gidley and
8 adopt his objections and qualifications. I have no
9 problem with Mr. Bazerman being an expert in
10 negotiation, dispute resolution and decision biases.

11 JUDGE CHAPPELL: Okay, thank you.

12 Mr. Gidley, since it's not really clear that we
13 have a disagreement, I'm not going to disrupt the
14 direct examination at this time for voir dire, but
15 you're welcome to inquire into those areas on your
16 cross.

17 MR. GIDLEY: Very good, Your Honor.

18 JUDGE CHAPPELL: The motion is granted.

19 MR. KADES: Thank you, Your Honor.

20 BY MR. KADES:

21 Q. Professor Bazerman, in the course of your work
22 on this case, what materials have you reviewed in
23 forming your opinion?

24 A. May I turn to my report so I can be accurate in
25 answering this question -- that question?

1 Q. If it will help your memory. I believe it is
2 CX 755.

3 A. Thank you. So, on page 2 of my expert report,
4 I listed a number of documents, the FTC administrative
5 complaint in this matter, the complaint counsel's
6 statement of the case, two Schering-Plough respondent's
7 statements of the case, Upsher-Smith's statement of the
8 case, the settlement agreement between Schering and
9 Upsher-Smith, the settlement agreement between Schering
10 and AHPC, the expert report of Dr. Nelson Levy, the
11 expert report of Professor Timothy Bresnahan, the
12 expert reports of Professor Willig, Professor Ordover,
13 Dr. Kerr and Dr. Addanki, the expert report of
14 Professor Mnookin, and the expert report of Mr.
15 O'Shaughnessy.

16 Subsequently, I also read the expert report of
17 Mr. Fliesler. I believe I read the deposition -- the
18 depositions of Professor Mnookin and Mr. O'Shaughnessy,
19 and I've read -- I've read the court transcripts of the
20 testimony of Professor Mnookin, Mr. O'Shaughnessy,
21 Professor Willig and Dr. Addanki. I think that that's
22 the list of documents that I've read to prepare for
23 today.

24 Q. And Professor Bazerman, did the FTC give you
25 any assumptions to make in the course of doing your

1 analysis and coming to your opinions in this case?

2 A. Yes, the FTC asked me to assume for my analysis
3 Dr. Levy's conclusion that the \$60 million paid from
4 Schering-Plough to Upsher-Smith was in excess of the
5 value of the licenses that they obtained in return for
6 the \$60 million.

7 Q. Professor Bazerman, have you reviewed the
8 testimony of Professor Willig, Dr. Addanki, Professor
9 Mnookin and Mr. O'Shaughnessy relating to their views
10 on the benefits of settlements?

11 A. I have.

12 Q. Have you specifically reviewed the testimony of
13 those experts as to how a side deal and payments from
14 patent holders to entrants can lead to beneficial
15 settlements?

16 A. I have.

17 Q. What is your understanding of their testimony?

18 A. My understanding of their testimony is that
19 they're arguing that -- two things. One, that value
20 creation through side deals can create agreements that
21 are beneficial for the two parties that are in
22 negotiation and reduce the likelihood of impasse and
23 therefore going to litigation. And two, there is a
24 conclusion that the value creation is overall good for
25 society, and I'm describing my read of their testimony.

1 Q. And Professor, do you agree that trades that
2 enlarge the pie are good for the parties to the
3 settlement?.

4 A. I do.

5 Q. And what is your understanding of the phrase
6 "enlarge the pie"?

7 A. It means create more resources for the two
8 parties in negotiation to share as they sort of claim
9 various chunks of that pie for the two respective
10 parties. So, you can think of it visually as we have a
11 pie, it being divided between A and B, and enlarging
12 the pie means create a larger pool of resources that
13 they're able to divide in the negotiation process.

14 Q. And do you agree that more often than not, that
15 parties who can enlarge the pie are creating deals that
16 are beneficial to society?

17 A. I do. More often than not, value creation is
18 a -- is good for society, and I'm proud to be part of
19 the negotiation field that teaches individuals in a
20 variety of professions how to do that.

21 Q. Would you agree that a settlement that enlarges
22 the pies for the parties is beneficial to society?

23 A. I certainly do not.

24 Q. Why?

25 A. Because we have to look at where the value's

1 coming from. A few years ago, I wrote a paper with
2 James Gillespie called "Parasitic Integration," and we
3 bring up the possibility that two parties might enlarge
4 the pie, that is, increase the resources that A and B,
5 the two parties at the table, receive, but the
6 increased resources come from parties who aren't at the
7 table. So, it's parasitic in the sense that the value
8 is taken away from other parties, and that could occur
9 in many cases where two firms, if they coordinate
10 together, they could increase each of their respective
11 profitabilities, but that profitability comes at the
12 expense of consumers.

13 Q. Now, you said you published an article entitled
14 "Parasitic Integration." In what journal was that
15 published?

16 A. It was published in the Negotiation journal,
17 which is a journal created by the Program on
18 Negotiation.

19 Q. And what -- do you know the specific citation
20 for that?

21 A. I have it in front of me, so I can -- I can
22 turn to it. It's "Parasitic Integration: Win-win
23 Agreements Containing Losers," and it was published in
24 the Negotiation journal in 1997, and the authors were
25 James J. Gillespie and Max H. Bazerman.

1 Q. Now, is there a standard model used in
2 negotiations that illustrates the principle of
3 parasitic integration?

4 A. I can think of a piece of teaching technology
5 where -- that would illustrate that.

6 Q. And what is that teaching technology?

7 A. I'm thinking of a Program on Negotiation
8 simulation that's quite well used called the Oil
9 Pricing Exercise, and the way this exercise works is
10 there's two parties, two either companies or countries
11 who are making decisions about whether to choose low,
12 medium or high prices. Each of these firms is better
13 off charging less than the other to gain market share;
14 however, if they both try to price less, they end up
15 charging lower prices, which is helpful for -- helpful
16 for consumers.

17 However, if they maximize the profitability of
18 these two parties who are part of the negotiation by
19 moving to high, high prices, they both end up being
20 more profitable with -- than with low, low prices, but
21 the gain that they've created is basically being paid
22 for by consumers.

23 Q. Now, is there a term used -- I'm sorry.

24 Professor Bazerman, have you had graphics
25 prepared that illustrate the difference between value

1 creation negotiation and parasitic integration?

2 A. I have.

3 Q. I'll show you what's been marked as CX 1769.

4 Is this one of the slides you had prepared?

5 A. Yes, it is.

6 Q. And would it help you to go to the bigger

7 screen to demonstrate what --

8 A. I'd be happy to.

9 MR. KADES: Your Honor, may I ask permission
10 for Mr. Bazerman to go to the plasmascreen?

11 JUDGE CHAPPELL: He may if he wants to. I'm
12 not sure how much it will help him, it doesn't look
13 that complicated, but he's free to go over that slide
14 if he would like.

15 THE WITNESS: I'm flexible here.

16 JUDGE CHAPPELL: It's your decision.

17 THE WITNESS: I'll go over here. I'll feel
18 more like a professor.

19 This is a very simple slide, as Your Honor
20 suggested, and basically this is the straightforward
21 argument that value creation is good, and if parties
22 can come up with wise trades to move from this
23 situation to this situation, both A and B end up better
24 off, and overall that looks like a good news story all
25 around.

1 BY MR. KADES:

2 Q. And how does that compare to parasitic
3 integration?

4 A. Well, I prepared another -- I had another slide
5 prepared that would illustrate that.

6 Q. And I think that's CX 1768.

7 A. And in this chart, we could imagine that we had
8 a company that had a branded product, another company
9 had a generic product, and one of the things that we
10 expect to happen in that environment is that when a
11 generic product enters, if you start with the amount of
12 profit that the incumbent was making earlier, that --
13 that then the generic entrant would earn some of the
14 profit. A good chunk would still remain with the
15 incumbent, but consumers benefit because of price
16 competition. So, in comparison to the monopolistic
17 situation that might exist before, we end up seeing the
18 pie divided three ways.

19 If, however, the parties are able to --

20 MR. GIDLEY: Objection, Your Honor, foundation.
21 I believe the witness is straying into the area of
22 industrial organization.

23 MR. KADES: Your Honor, I think he's not
24 testifying about industrial organization. He's
25 testifying about how in the field of negotiations this

1 type of deal would be understood differently than in a
2 straight value creation deal.

3 MR. GIDLEY: Your Honor, if I may, if complaint
4 counsel is saying that they're offering this as just
5 another illustration and that these terms are basically
6 being used in their lay meaning, generic firm, and he's
7 just simply talking with a lay understanding rather
8 than some kind of technical mastery of the Hatch-Waxman
9 Act or industrial organization, then I don't have an
10 objection.

11 MR. KADES: That is how we're offering it,
12 not -- he's not commenting on Hatch-Waxman or the
13 pharmaceutical industry. He's just trying to testify
14 about what is parasitic integration and using an
15 example that is germane to this case.

16 MR. GIDLEY: Your Honor, if I may finish, the
17 other thing is the witness has now used the term
18 "monopolistic," and again, if he is using it in sort of
19 a New York Times lay understanding of monopoly, we
20 don't object. If the witness is saying monopoly to the
21 extent that the witnesses have testified in this
22 courtroom here at the FTC in a technical sense, we
23 object.

24 JUDGE CHAPPELL: What about a Houston Chronicle
25 lay understanding?

1 MR. GIDLEY: Houston Chronicle or Washington
2 Times, either way, Your Honor.

3 MR. KADES: I think --

4 JUDGE CHAPPELL: He's not purporting to be
5 using "monopolist" in the technical sense, is he?

6 MR. KADES: Correct.

7 JUDGE CHAPPELL: So, the objection is
8 withdrawn?

9 MR. GIDLEY: It is, Your Honor.

10 JUDGE CHAPPELL: Proceed. I'm glad you got
11 past the parasitic label. Go ahead.

12 THE WITNESS: So, what I was suggesting was
13 that it might be possible for these two parties, the
14 entrant and the incumbent in my example, to reach an
15 agreement that basically made both of them better off
16 on the right-hand side than on the left-hand side, the
17 red and the green area are both bigger, but it wasn't
18 value creation in the sense of making two parties
19 better off while leaving other parties unaffected.

20 In this story, the integration or the value
21 creation is coming at the expense of the folks who are
22 in the blue wedge, in this case illustrated as
23 consumers.

24 BY MR. KADES:

25 Q. Thank you, Professor.

1 And what does this analysis of parasitic
2 integration suggest about the opinions of Dr. Addanki,
3 Professor Mnookin, Professor Willig and Mr.
4 O'Shaughnessy about the benefits of agreements that
5 settle a lawsuit?

6 A. So, as I mentioned earlier, my read of their
7 testimony suggested that value creation was good for
8 society, which I generally agree is a correct
9 categorization; however, I think we have to look at --
10 I left my water earlier, so if I can either get that
11 water or -- that would be great.

12 MR. CURRAN: I could tell the witness wanted
13 water, that's why I handed it up.

14 THE WITNESS: Thank you very much.

15 So, as I was saying, if we want to understand
16 whether value creation is good for society or not, we
17 have to ask was this true value creation where we're
18 making two parties better off while leaving other
19 parties neutral, or is that value -- is that value
20 creation coming at the expense of parties who aren't at
21 the table, for example, consumers?

22 And it's my read that when that value is coming
23 at the expense of consumers that the value creation
24 between A and B isn't good for society and simply
25 moving resources from consumers to parties A and B.

1 BY MR. KADES:

2 Q. Professor, have you reviewed Professor
3 Bresnahan's -- I'm sorry, you mentioned that you
4 reviewed Professor Bresnahan's expert report?

5 A. That is correct.

6 Q. And you're aware of his opinion that the
7 payment in the Schering-Upsher settlement was for
8 delay?

9 A. I am.

10 Q. And are you aware from the reports and
11 testimony of the experts that -- for the defendants
12 that you reviewed that they provide various
13 justifications for why payment from a patent holder to
14 a potential entrant may not be a payment for delay?

15 A. I am.

16 Q. Okay. And has your research shown that
17 judgment in negotiation frequently deviates from
18 rational models?

19 A. My research has shown that. That's a core
20 result of my work.

21 Q. Now, assuming for the -- assuming, as the FTC
22 has asked you to do, that the \$60 million payment to
23 Upsher was not for Niacor and assuming for the moment
24 that Professor Bresnahan's analysis about the existence
25 of monopoly power, do you see anything in the

1 literature that you've worked on that would suggest or
2 lead to the conclusion that the payment in this case
3 was not for delay?

4 MR. GIDLEY: Your Honor, objection, vague as to
5 "literature."

6 MR. KADES: Your Honor, let me -- perhaps I can
7 rephrase, if I can --

8 JUDGE CHAPPELL: Go ahead. One thing I think
9 we all forget is the witness doesn't have the CaseView,
10 and they can't look back and see what the question was.
11 So, with that in mind, you may want to have her reread
12 it, but you're going to need to rephrase based on the
13 objection or respond to the objection.

14 MR. KADES: I'm going to rephrase the question,
15 Your Honor.

16 BY MR. KADES:

17 Q. In what ways has your research shown that
18 judgment in negotiations frequently deviates from
19 rational models?

20 A. In a wide variety of systematic biases that are
21 summarized in my book Judgment in Managerial Decision
22 Making, but it would include that people are -- pay too
23 much attention to vivid data, that we tend to be
24 anchored on the status quo. We tend to be affected by
25 the frame in which information is presented. We tend

1 to escalate commitment to a previous course of action.
2 We tend to have self-serving interpretations of what's
3 fair. And that can go on and on and on, but that's a
4 sample of the many biases that are documented in my
5 Judgment book.

6 Q. Now, assuming that the \$60 million payment to
7 Upsher was not for Niacor and assuming that Professor
8 Bresnahan's analysis of monopoly power is accurate, do
9 you see anything in the literature on these biases that
10 you've researched that would lead you to a conclusion
11 that the payment was not for delay?

12 A. I do not.

13 Q. Why not?

14 A. I was -- I guess my earlier answer to you was I
15 don't see any logic that I find compelling to suggest
16 that the payment was for anything other than delay,
17 again, assuming Dr. Levy's conclusion that the \$60
18 million was excessive.

19 Q. Now, Professor Bazerman, are there certain
20 types of biases that you've studied that you think are
21 likely to be present in the negotiations between
22 Schering and Upsher?

23 A. I do.

24 Q. What are those biases?

25 A. I would see the frame in which decisions were

1 made as quite relevant, and I also see self-serving
2 biases as two areas where I could see quite clear
3 implications for what -- for the negotiation that
4 occurred between Schering-Plough and Upsher-Smith.

5 Q. And what is --

6 MR. GIDLEY: Your Honor, objection on
7 foundation to the last two questions. To the extent
8 that this witness is testifying about our case, no
9 foundation has been laid that he's reviewed anything in
10 our case, that is, the case of Upsher-Smith and
11 Schering, Your Honor.

12 MR. KADES: I believe he testified that he did
13 review the complaint, statements of the case, he
14 reviewed the agreement, he reviewed testimony, he's
15 reviewed expert reports.

16 JUDGE CHAPPELL: Well, Mr. Gidley, under Rule
17 705, the witness may give his opinions on direct
18 without filling us in on the underlying data and
19 assumptions. You have the right to inquire into that
20 on cross exam.

21 MR. GIDLEY: Very good, Your Honor.

22 JUDGE CHAPPELL: Overruled at this time.

23 MR. KADES: Could we have the last question
24 read back?

25 (The record was read as follows:)

1 "QUESTION: What are those biases?

2 "ANSWER: I would see the frame in which
3 decisions were made as quite relevant, and I also see
4 self-serving biases as two areas where I could see
5 quite clear implications for what -- for the
6 negotiation that occurred between Schering-Plough and
7 Upsher-Smith."

8 BY MR. KADES:

9 Q. Professor Bazerman, what is self-serving bias?

10 A. In my book Judgment in Managerial Decision
11 Making, the majority of the book focuses on what are
12 called cognitive biases. Cognitive biases are biases
13 that have at their root rules of thumb that we use
14 without even knowing that we're using them.

15 There's another topic represented in my book
16 called motivational biases. Self-serving biases --

17 MR. GIDLEY: Objection, Your Honor. I'm sorry
18 to interrupt, but this testimony is beyond the scope of
19 the expert rebuttal report provided to Upsher-Smith.
20 There's no mention -- and I would ask for a
21 reference -- of self-serving bias anywhere in Professor
22 Bazerman's expert report.

23 MR. KADES: Your Honor, in Professor Bazerman's
24 rebuttal report on pages 4 to 5, in commenting on
25 the -- what he's read from the economic experts, he

1 wrote, "However, settlements involving payments from
2 the branded firm to the generic entrant are most likely
3 to be anti-competitive under virtually all of the
4 conditions examined across the many pages of these --
5 by these economists."

6 MR. GIDLEY: And Your Honor, none of that has
7 anything to do -- excuse me, I'm sorry.

8 MR. KADES: I'm not finished.

9 "In addition, under all the conditions explored
10 in these four reports, an incentive will remain for the
11 branded firm to pay the generic firm to delay entry if
12 the courts allow such behavior."

13 In his deposition, he explained that when
14 talking about incentives, he was talking both about the
15 incentive -- this is -- what I think is sort of the
16 corrupt incentive to violate the law, but that there
17 was also an incentive based on self-serving bias.

18 MR. GIDLEY: And Your Honor, having listened to
19 this and having looked at the expert report, there's no
20 reference to self-serving bias anywhere in this report.
21 I took the deposition, and I don't recall any
22 discussion, any Q&A on self-serving bias.

23 This witness has written a lot of books, and
24 we've read a lot of those books, but this is new
25 testimony that's beyond the four corners of his expert

1 report.

2 JUDGE CHAPPELL: What about motivational bias?

3 MR. GIDLEY: I don't recall him saying that,
4 and maybe complaint counsel can point us to that and --

5 JUDGE CHAPPELL: What's the point you're trying
6 to make, Mr. Kades, with this line of questioning?

7 MR. KADES: In this line of questioning, I
8 believe we've heard expert testimony that -- from
9 Professor Willig and others that despite the economic
10 incentives that parties may have that they would have
11 an incentive to obey the law.

12 What Professor Bazerman said in his expert
13 report was that -- was critiquing that argument, and
14 the basis for critiquing that is the work that's been
15 done on self-serving bias, that it's not solely a
16 question of whether parties are intentionally -- in the
17 sense of corruptly -- trying to violate the law, but
18 that under certain circumstances, parties will suffer
19 from self-serving bias that will allow them to reach
20 decisions that are harmful to society.

21 JUDGE CHAPPELL: And tell me again where this
22 was covered in his expert report.

23 MR. KADES: It was covered in his expert report
24 where he said that he did not find the -- the expert
25 reports' justifications persuasive, because under all

1 those conditions, the incentives will remain for the
2 branded firm to pay the generic firm to delay entry if
3 the courts allow such behavior, and if I may, Your
4 Honor, on page 197 of his deposition, in questioning
5 from Mr. Gidley, beginning at line 14, the question
6 was:

7 "QUESTION: The long answer you gave me has its
8 basis in which sentence on page 4 and 5?

9 "ANSWER: However, settlements involving
10 payments from the branded firm to the generic entrant
11 are most likely to be anti-competitive under virtually
12 all of the evidence examined across the many pages of
13 analysis by these economists.

14 "QUESTION: And how did you arrive at the
15 conclusion that virtually all the conditions across the
16 many pages would be anti-competitive?

17 "ANSWER: Because in all of these situations,
18 basically what you're doing is you're creating a fairly
19 complex agreement pattern with fairly complex argument,
20 and once we get into that domain, either for
21 intentional reasons or for self-serving reasons of
22 fairness, there's going to become the incentive that
23 Professor Bresnahan develops for the branded to
24 directly or indirectly pay the generic firm to move the
25 entry date out further. So -- and that exists after

1 you add in all these variables, that incentive still
2 remains, and the more complex it gets, the more
3 ambitious in the context of what would be fair, and it
4 becomes more and more impossible for the FTC to
5 diagnose, and that's why I'm in favor of a brighter,
6 bluer line than might be preferred by Schering-Plough
7 and Upsher-Smith," and that continues to page 198,
8 through line 15, Your Honor.

9 MR. GIDLEY: Just so the record was clear, I
10 was at the deposition, I have now been shown a couple
11 of excerpts where the phrase "self-serving" was used at
12 the deposition. It was not so used, Your Honor, in his
13 expert report.

14 JUDGE CHAPPELL: In that portion of the
15 deposition, were you inquiring into his expert report?

16 MR. GIDLEY: I think I was asking relatively
17 open-ended deposition questions about the four corners
18 of his opinion, Your Honor, the limits of his opinion.

19 MR. KADES: Your Honor, I'd point out that the
20 answer that -- the question and answer I read into the
21 record was -- the question was a specific question
22 about the specific sentence that rendered the opinion
23 about self-serving bias.

24 JUDGE CHAPPELL: Well, I think to be consistent
25 with my previous rulings, if it was inquired into as

1 arising out of the expert report -- and by the way,
2 this isn't going to crack the earth -- I'm going to
3 allow this line of questioning, and you have the right
4 to inquire on cross exam.

5 Go ahead.

6 MR. KADES: I'm sorry, Your Honor, I have to --

7 BY MR. KADES:

8 Q. What is self-serving bias?

9 A. Self-serving bias is a tendency of individuals
10 to see the world in the way that they would prefer to
11 see them. So, for example, if you ask people on a
12 scale of 0 to 100 where 50 is average, 100 is best, 0
13 is worst, to rate their driving abilities, to rate
14 their decision-making skills, to rate how attractive
15 they are, how good they are at tennis, people tend to
16 see themselves in a more positive light than reality
17 suggests.

18 Self-serving biases also apply to a variety of
19 domains where people tend to see an objective
20 outcome -- tend to have the perception of what an
21 objective outcome would be in a way that would be more
22 positive from what they would like to -- it to be.

23 Q. Have you reviewed the testimony of Professor
24 Willig, Dr. Addanki, Mr. O'Shaughnessy related to the
25 defendants' incentive to obey the law when faced with

1 incentives to delay entry?

2 A. I have.

3 Q. What's your understanding of their opinions?

4 A. My understanding is that the experts that you
5 mentioned were of the opinion that people generally
6 follow the law and therefore that -- that decisions
7 should be made in terms of the creation of law in a way
8 that assumes that people, executives in corporations,
9 will follow that law.

10 Q. Do you agree with that opinion -- those
11 opinions?

12 A. I do not.

13 Q. Why not?

14 A. For two reasons. One, I know lots of people
15 who I assume fill out their tax forms legally, and my
16 guess is that I know a small number who may not. I
17 can't tell you who they are, but it would be my
18 assumption that while the majority of the people do
19 follow the law that there are a smaller number of
20 people who would violate the law on an opportunistic
21 basis.

22 But the more important reason I disagree with
23 their conclusion has to do with the self-serving biases
24 that we were just talking about; that is, it's --
25 there's extensive research that suggests that given

1 ambiguity, people will tend to interpret the law in
2 ways that will be self-serving. That is, at the
3 margin, when they are engaging in behaviors that a
4 neutral observer might find unethical or illegal, that
5 the actors may reach a conclusion putting it on the
6 other side of the line and therefore engage in
7 behaviors that they wouldn't condone if they weren't
8 the party in the midst of that action.

9 Q. Now, have there been studies of this type of
10 behavior?

11 A. There have been extensive studies of this type
12 of behavior.

13 Q. And can you give us an example of the types of
14 studies that have been done?

15 A. I think one of the leading papers on this topic
16 is a paper by Babcock and Lowenstein in the Journal of
17 Economic Perspectives, I believe in 1996, where they
18 summarize this stream of research, including their own
19 very well done research, that reaches the conclusion
20 that in negotiation contexts, people tend to have
21 self-serving interpretations of what would be a fair
22 resolution.

23 So, in one of their own studies that they
24 summarize in the '96 paper, they had students play the
25 role of plaintiff or defendant, and the plaintiff and

1 defendant had the exact same information. Soon after
2 the two parties are simulating the negotiations,
3 they're interrupted and the two parties are asked to
4 estimate what a neutral party would judge to be fair,
5 specifically, what the judge did award in the actual
6 case that the simulation was based on, and that Babcock
7 and Lowenstein were rewarding the study participants
8 based on how accurate they were in estimating the
9 judge's award.

10 The interesting result is that plaintiffs
11 estimate in number roughly twice what defendants
12 estimated in that study, and the logic there is that
13 simply by plaintiffs being in the role of plaintiff --
14 and these are students simulating the role without as
15 much emotion as a real plaintiff would have -- that
16 they're already seeing the just settlement very
17 differently than the defendants.

18 Q. And have you yourself studied this concept of
19 self-serving bias, particularly in how it affects
20 public policy decisions related to the environment?

21 A. I have.

22 Q. And in what context did you study this?

23 A. I published a paper in 1996 in Organizational
24 Behavior and Human Decision Processes with Kimberly
25 Wade-Benzoni and Ann Tenbrunsel where we created a

1 simulation modeling the New England fishery crisis, and
2 as you may know, the New England fishery crisis has
3 been on the brink of disaster, perhaps even beyond that
4 point, and we went back to the point where the major
5 fishery interests were making decisions about the level
6 of harvesting that they would engage in.

7 In that study, what we argued was that by
8 looking at the four major fishing constituencies, that
9 self-serving biases were a critical determinant of why
10 the fisheries over-harvested that basin.

11 In our simulation, what we did was we had the
12 four parties who each had the same identical
13 information estimate what percent of the total harvest
14 that they thought their fishery interest deserved. So,
15 we had parties A, B, C and D, and we asked A what
16 percent of the harvest A deserved, B what percent that
17 B deserved, et cetera, and if the parties were
18 objective, the four percentages that we would
19 receive -- that we received should add up to 100
20 percent.

21 There are two interesting results in this
22 study. One, on average, the four percentages added up
23 to 122 percent. That is, people tended to perceive
24 that they deserved more than an objective analysis
25 would allow. And interestingly, the greater the

1 self-serving biases by different groups of four, the
2 greater the over-harvesting that resulted.

3 JUDGE CHAPPELL: Mr. Kades, if this wasn't
4 brought out in detail in his expert report, I wouldn't
5 expect this to be the biggest part of your rebuttal.
6 How many more questions do you have in this area?

7 MR. KADES: I would guess about ten more
8 questions.

9 JUDGE CHAPPELL: If it's that important, why
10 wasn't it in his expert report?

11 MR. KADES: Your Honor, we think it was in his
12 expert report, and -- and, you know, we did, as Your
13 Honor knows, we did -- there were opinions that we did
14 not think were necessary to cover in the scope of his
15 report, and we submitted a supplemental report. So,
16 in -- I mean, in good faith, I think that's a sign that
17 we were -- we thought it was within the scope of his
18 initial report, that when he was talking about the
19 types of incentives, he was talking both about
20 self-serving bias and corrupting incentives, the sort
21 of more malicious incentives.

22 MR. NIELDS: Your Honor, I'm quite certain
23 there were no fish in the report.

24 MR. KADES: Your Honor, this is a -- he's
25 particularly now talking about a study that he did,

1 it's on his CV, his CV was attached to his report.

2 JUDGE CHAPPELL: I'm going to allow you to go
3 on for what it's worth, but I'm going to give this the
4 weight it deserves.

5 Go ahead.

6 BY MR. KADES:

7 Q. Professor Bazerman, have you published articles
8 applying self-serving bias in the area of business
9 ethics?

10 A. I have.

11 Q. And what articles have you published?

12 A. I've published a paper with my colleague David
13 Messick (phonetic) in the Sloan Management Review where
14 we examined the root causes of unethical behavior by
15 business executives, and a core argument in that paper
16 is intentionally corrupt decisions are not the primary
17 issue that result in unethical business decisions;
18 rather, it's self-serving interpretations of what's
19 fair that creates many more ethical problems than
20 intentionally corrupt behavior.

21 Q. Can you give us an example of how self-serving
22 interpretations can create the problem with corrupt
23 decision making?

24 A. Sure. I also published a couple of papers on
25 auditor independence, which has currently become a hot

1 topic. Back in 1997, I published with Kimberly Morgan
2 and George Lowenstein a paper called "The Impossibility
3 of Auditor Independence," and the core argument that we
4 suggested in 1997, which unfortunately has become too
5 accurate, was that as long as auditors had a -- who are
6 supposed to provide independent audits, unbiased
7 audits --

8 MR. NIELDS: Your Honor, I think we really are
9 getting pretty far afield. I smell Enron coming along,
10 and I don't think that has a lot to do with this case.

11 JUDGE CHAPPELL: Mr. Kades, I'm wondering how
12 much testimony do we need that human beings are biased
13 to be self-serving? Is that not obvious, that everyone
14 looks out for themselves?

15 MR. KADES: Well, I think Professor Willig, the
16 implication of his testimony was that, in fact, that's
17 not true. He admitted that under his models, that he
18 did not model the way -- define a pro-competitive
19 agreement, and his defense was, well, the parties would
20 want to obey the law.

21 JUDGE CHAPPELL: You're talking about a
22 negotiation. I'm talking about human beings in
23 general, as I'm hearing him tell us about. I went back
24 in CaseView, I looked at how he defined self-serving
25 bias, and to me in layman's terms it means everybody

1 looks out for themselves first and projects that onto a
2 situation. So, I'm wondering how much time we need to
3 spend.

4 I'll overrule the objection at this time,
5 but -- go ahead.

6 THE WITNESS: Should I continue my answer?

7 JUDGE CHAPPELL: Yes.

8 THE WITNESS: So, in that paper, what we argued
9 is to the extent that auditors have self-interest in
10 providing a more positive audit because they want to
11 resell more services, they want to sell consulting
12 agreements, that they are likely to provide more
13 positive audits than an unbiased view would suggest,
14 and more importantly, they are likely to do this
15 without even being aware of it, so that you have both
16 the problem of corrupted audits by corrupt people, but
17 corrupted audits by honest people who simply see the
18 financial statements of their clients in a more
19 positive light because of their self-interest to keep
20 the client happy.

21 BY MR. KADES:

22 Q. And what is the significance of self-serving
23 bias to the opinions as you understand expressed by the
24 defendants' experts, incentives to obey the law?

25 A. Well, as I understood the experts that you

1 referred to earlier, they're arguing that -- that an
2 incumbent and an entrant would not intentionally
3 collude to reduce competition at the expense of
4 consumers. What I'm suggesting in our -- in this
5 discussion of self-serving biases is not only is some
6 probability of corrupt -- of intentionally corrupt
7 behavior possible, but it's also possible that honest
8 business executives would delay the time to market of
9 the generic entrant, okay, based on self-serving biases
10 without even being -- without even realizing it.

11 The key to why I think self-serving biases are
12 so important is that we have these biases beyond the
13 level that we're aware of. So, yes, we want what's
14 best for us, but we often see reality in a distorted
15 way that allows us to continue to believe the honesty
16 of our argument but still act in ways that end up being
17 self-serving.

18 Q. Now, based on your research and the literature,
19 are there conditions that tend to exacerbate
20 self-serving bias?

21 A. Absolutely.

22 Q. What are those conditions?

23 A. Both in the work of Babcock and Lowenstein as
24 well as in my fish study, what we found out was that
25 the greater the ambiguity, the more likely it is that

1 you'll have self-serving biases. So, the greater the
2 ambiguity about the rules, the greater the ambiguity
3 about the future, the more likely people will -- will
4 make assumptions that end up acting in a
5 self-serving -- to act in a self-serving manner.

6 Q. And how does the identity of the party that
7 will be -- that could be harmed by this decision, how
8 does that affect self-serving bias?

9 A. Well, in many cases where the parties being
10 harmed -- for example, future consumers, future
11 generations of fishers or consumers, in many cases the
12 parties being harmed are statistical. They're not
13 identifiable. And what George Lowenstein suggests is
14 that we're more likely to make self-serving
15 interpretations of what's fair when the harm occurs to
16 unidentifiable -- unidentifiable victims.

17 Q. Now, Professor, I'd like you to -- let's assume
18 for the moment that the legal rule for patent
19 settlements is that the fact finder must determine the
20 probabilistic outcome of the litigation. How could
21 parties bargaining in the context of that rule be
22 affected by self-serving bias?

23 A. For me, that sounds like a highly ambiguous
24 environment where a third party without access to as
25 much information would have to know what the objective

1 date would be. Under that condition, I would -- I
2 would predict that self-serving biases are quite likely
3 to be -- have a significant influence on the outcome of
4 any settlement and the details of the negotiation
5 processes.

6 Q. Why would the parties enter a settlement that
7 is illegal under the assumption I gave you in the last
8 question?

9 A. Can I have that question again, please?

10 Q. Why would the parties enter a settlement that's
11 illegal?

12 A. Because they -- because there's ambiguity about
13 what's illegal or not illegal, and as a result, they
14 end up making self-serving interpretations of what's
15 legal.

16 Q. Are you familiar with the -- have you reviewed
17 testimony from the defendants' experts that a rule
18 prohibiting net consideration from the patent holder to
19 the entrant will chill settlements?

20 A. I am.

21 Q. What is your understanding of those opinions?

22 A. My understanding is that the opinion was
23 offered that -- that to the extent that net
24 consideration was not allowed, that parties would be
25 less likely to settle their own agreement, and that

1 would create more litigation.

2 Q. Do you agree with that opinion?

3 A. Not completely. I think that agreements where
4 the two parties at the table were parasitically
5 integrating at the expense of consumers, those
6 agreements I would expect would be chilled, and I think
7 that it's a good thing that they would be chilled, but
8 I see no reason why agreements that are creating true
9 joint value without taking it from the consumers, I see
10 no reason why parties wouldn't continue to be able to
11 reach those kinds of agreements. So, the only
12 agreements that I see being chilled are agreements that
13 society would be better off having chilled.

14 MR. KADES: Your Honor, that concludes the
15 direct, but there is the proffer we would like to make
16 as to the testimony from the supplemental expert
17 report.

18 JUDGE CHAPPELL: What -- are you merely
19 proffering the supplemental report?

20 MR. KADES: No, we would like to do the
21 testimony by question and answer, Your Honor.

22 JUDGE CHAPPELL: But you're staying within the
23 bounds of what I excluded in my ruling?

24 MR. KADES: Yes.

25 JUDGE CHAPPELL: Okay. Susanne, the following

1 is not evidence. It's being put in the record for
2 identification only.

3 Proceed.

4 MR. KADES: Thank you, Your Honor.

5 (The following is proffered testimony offered
6 for identification only.)

7 BY MR. KADES:

8 Q. Professor Bazerman, have you reviewed the
9 testimony of Dr. Addanki and Professor Willig relating
10 to the impact of risk preference on settlement
11 negotiation?

12 A. I have.

13 Q. What is your understanding about their opinions
14 about risk aversion?

15 A. My understanding is that their key conclusion
16 is that with the assumption that the incumbent is risk
17 averse that -- that an agreement that included net
18 consideration could, in fact, end up being
19 pro-competitive.

20 Q. What is your understanding for why they take
21 the position that patent holders would be risk averse?

22 A. Well, Dr. Addanki mentions in his testimony
23 that Schering-Plough would be facing the loss of market
24 share, and he reaches the conclusion that decision
25 makers tend to be risk averse when they're facing

1 losses.

2 Q. And what was your understanding of Professor
3 Willig's view on whether -- why corporations are risk
4 averse?

5 A. He argued that corporations -- that people are
6 generally risk averse, which is consistent with
7 economic theory through the 1970s.

8 Q. Now, assuming for the moment people are risk
9 averse, would you agree that we can draw the conclusion
10 that corporations are risk averse?

11 A. Not necessarily.

12 Q. Why not?

13 A. Because corporations -- shareholders would like
14 their -- would like the companies that they buy stock
15 in to ask -- to act in a fairly risk neutral manner
16 with very rare exception and that they can better
17 handle their own risk preferences based on the asset
18 allocation that they select. So, I would expect that
19 corporations would be far less at variation from risk
20 neutrality than individuals would, but certainly
21 corporations would at times deviate from risk
22 neutrality.

23 Q. Let's turn to the assumption that people are
24 risk averse.

25 A. Um-hum.

1 Q. I'd like to show you SPX 2296, if you would --
2 did you review testimony where Dr. Addanki or Dr. -- or
3 Professor Willig discussed the second quote on SPX
4 2296, the one from Frederick Scherer?

5 A. I did.

6 Q. And what was the year of that quote?

7 A. 1980.

8 Q. Okay. And can I show you -- I'm now going to
9 show you SPX 2295.

10 A. Um-hum.

11 Q. Did you review testimony from Professor Willig
12 and Dr. Addanki where they discussed the second quote
13 on that chart, the one from Professor Kenneth Arrow?

14 A. I did.

15 Q. What was the date of that quote?

16 A. 1974.

17 Q. Do you agree with the statements in those
18 quotes from these well-known economists?

19 A. I do not.

20 Q. Was it -- do you think that those quotes at any
21 time did state the understanding of the -- about risk
22 aversion?

23 A. I do believe that those quotes were very
24 consistent with the state of the scientific literature
25 through 1979 to capture what the scientific community

1 thought about risk preferences.

2 Q. What happened in 1979?

3 A. In 1979, Daniel Kahneman and Amos Tversky
4 published one of the most famous papers in the social
5 sciences in Econometrica, a prestigious economic
6 journal, where they introduced prospect theory, and
7 prospect theory suggested that individuals did not
8 follow the rational model as had been previously
9 considered, and that rational model included the
10 sentiments in the last two quotes that you've asked me
11 about.

12 Key to the 1979 Kahneman and Tversky
13 publication was the very strong conclusion that people
14 tend to be risk averse to gains but risk seeking to
15 losses, okay? That is, that when individuals were in
16 situations where they were confronting gains, they
17 would be risk averse consistent with the previous
18 conclusion; however, in the domain of losses that, in
19 fact, individuals act in a risk seeking manner, not a
20 risk averse manner, quite inconsistent with the
21 previous understanding of the literature.

22 Q. And can you provide us with an example of how
23 Kahneman and Tversky studied this -- the effect on the
24 domains of losses versus the domains of gains?

25 A. Sure. Could I use the plasmascreen --

1 Q. Why don't we stay here since this is --

2 A. Okay, fine. I had prepared the -- a standard
3 Kahneman and Tversky problem, again, one of the most
4 famous problems, something called the Asian Disease
5 Problem, and version 1 you can see on the screen, and
6 this problem was given to a large number of individuals
7 in the original study. It's also been replicated many,
8 many times.

9 And if you read through it, it reads, "Imagine
10 that the U.S. is preparing for the outbreak of an
11 unusual Asian disease, which is expected to kill 600
12 people. Two alternative programs to combat the disease
13 have been proposed. Assume that the exact scientific
14 estimates of the consequences of the programs are as
15 follows:

16 "If Program A is adopted, 200 people will be
17 saved.

18 "If Program B is adopted, there is a one-third
19 probability that 600 people will be saved, and a
20 two-thirds probability that no people will be saved."

21 In this problem, the vast majority of
22 individuals prefer program A over B consistent with
23 being risk averse in the domain of gains.

24 Q. And why is this considered a problem framed in
25 the domain of gains?

1 A. Well, all the wording has to do with how many
2 lives will be saved, okay, so when you invoke saving,
3 gaining, positive, you evoke what Kahneman and Tversky
4 call a positive frame.

5 Q. And why is the choice of program B a sign of
6 risk aversion?

7 A. The choice of program A is a sign of risk
8 aversion.

9 Q. I'm sorry, why is the choice of program A --

10 A. Because that locks in the sure savings of 200
11 lives. Basically under program A you know what you're
12 going to get. You're going to save 200.
13 Unfortunately, you are not going to save the other 400.
14 Program B has the same expected value, one-third
15 probability of 600 lives is 200 lives, but it's a risky
16 option where you may save everybody and you may save
17 nobody.

18 Q. And what were the results of the Kahneman and
19 Tversky study where they presented this problem?

20 A. Again, the vast majority of individuals prefer
21 program A over program B.

22 Q. And what would be -- how did they test this
23 against the -- a negative frame or --

24 A. Well, if you can turn to the second version,
25 again, this is their work. The top paragraph I won't

1 reread, because it's exactly the same as the previous
2 problem, but this time, people are picking between
3 program C and program D. Program C -- if program C is
4 adopted, 400 people will die. What I'd encourage you
5 to notice is that program C is exactly the same as
6 program A, 200 people are being saved but 400 people
7 are dying.

8 And the alternative to C is program D, where
9 there's a one-third probability that nobody will die
10 but a two-thirds probability that 600 people will die.
11 Again, I'll note that program D is identical to program
12 B, simply the wording is changed, changing the frame of
13 the decision maker.

14 The interesting result is the vast majority of
15 individuals prefer program D over program C, despite
16 the fact that they preferred program A over program B.
17 So, by changing the frame of the decision maker, you
18 get a fundamental shift in the risk propensity, moving
19 from risk averse in the domain of gains to risk seeking
20 in the domain of losses, and this is one of the most
21 well-replicated, solid findings that exists in the
22 social science literature.

23 Q. Why is the choice of program D over program C a
24 sign of risk seeking behavior?

25 A. Again, the expected value of the two is the

1 same. Four hundred people dying has the same expected
2 loss as two-thirds probability of 600 people dying,
3 okay; however, program C, you're locking in the sure
4 loss, whereas program D has a probabilistic loss,
5 again, with the same expected value. So, C is a sure
6 thing, D is a risky option, just as A was the sure
7 thing and B was the risky option. Between A and B,
8 they're taking the sure thing; between C and D, they're
9 taking the risky option.

10 Q. Professor, do you need some water?

11 A. I'm okay, thank you.

12 Q. Have you studied prospect theory?

13 A. I have studied prospect theory extensively.

14 Q. And in what context have you studied prospect
15 theory?

16 A. A number of contexts. I've written about
17 prospect theory in a number of contexts but perhaps
18 with the clearest focus on the impact of framing in the
19 context of negotiations.

20 Q. And what was the -- what was that study that
21 you did regarding prospect theory and negotiation?

22 A. Well, the first study I did that connected
23 prospect theory to negotiations was a 1985 paper in
24 OBHDP, Organizational Behavior in Human Decision
25 Processes, with Thomas Magliozzi and Margaret Neale,

1 where we basically created a simulation, and we had
2 negotiators either induced into looking at the material
3 from a positive frame or looking at the exact same
4 information from a negative frame, and what we found
5 was that positively framed negotiators were risk
6 averse, whereas negatively framed negotiators were risk
7 seeking.

8 Q. Was that study published?

9 A. That was, again, in 1985 in Organizational
10 Behavior in Human Decision Processes.

11 Q. Is the title of that "Integrative Bargaining in
12 a Competitive Market"?

13 A. It is.

14 Q. Has prospect theory been applied to
15 negotiations in the context of the backdrop of
16 litigation?

17 A. It has.

18 Q. And what was that study?

19 A. The study that I know best that made that
20 connection was a paper by Linda Babcock, Henry Farber,
21 Cynthia Fobian and Eldar Shafir, and they created a
22 simulation very much in the same spirit of the study
23 that I just mentioned between a plaintiff and
24 defendant, and their conclusions -- their conclusion
25 was that plaintiffs who would gain at -- based on a

1 decision tended to be risk averse, but defendants who
2 would be paying out because there was a payment away
3 from the status quo tended to be risk seeking. So that
4 the party who was facing gains through the settlement
5 against the status quo was risk averse; the party who
6 was losing based in comparison to the status quo was
7 risk seeking.

8 Q. Has prospect theory been tested outside of the
9 experimental context we've been discussing?

10 A. In a number of studies. Colin Camerer provided
11 a review of I believe ten different real world domains
12 where prospect theory has been studied. Probably the
13 most well-known, real world application with real world
14 data is a study by Terrence Odean in the investment
15 world where Odean finds that people tend to hold their
16 losers and they sell their winners from their
17 investment portfolio, which is -- investment experts
18 would say is a bad mistake from a tax perspective.

19 That means that you're paying taxes on your
20 winners and you're not able to deduct the losses from
21 your losers, and Odean concludes that the reason that
22 people engage in this dysfunctional investment pattern
23 is that people are risk averse. They want to lock in
24 their sure gain, but when they're losing money, they
25 want to let it ride with the hopes that it will come

1 back up to neutral at the price that they bought the
2 investment to begin with.

3 Q. Professor Bazerman, are you aware of whether
4 the concept of prospect theory has been adopted by
5 economists?

6 A. I think that the field of economics very much
7 has endorsed prospect theory. Perhaps the fastest
8 growing area of economics is the area of behavioral
9 economics, where results like prospect theory -- and
10 prospect theory probably being the best known -- have
11 been adopted quite extensively in the last two decades.

12 Q. And are you familiar with a textbook by Robert
13 Pyndyck and Daniel Rubinfeld, Microeconomics, the
14 fourth edition?

15 A. I am.

16 Q. Would you consider that book reliable for basic
17 economic principles?

18 A. I've relied on it. It's in I believe its
19 fourth edition. I know lots of people who refer to
20 that as a standard economic -- microeconomic text.

21 Q. I'm going to read you a quote from that
22 textbook. It comes from page 157.

23 "In general, risk can arise where the expected
24 gain is either positive (e.g., a chance for a large
25 reward versus a small one) or negative (e.g., a chance

1 for a large loss or for no loss). The study found that
2 executives differ in their risk preferences toward
3 risk, depending on whether the risk involved gains or
4 losses. In general, those executives who liked risky
5 situations did so when losses were involved. (Perhaps
6 they were willing to gamble against a large loss in the
7 hope of breaking even.) However, when the risks
8 involved gains, the same executives were more
9 conservative, opting for the less risky alternatives."

10 Does that quotation comport with the general
11 learning on prospect theory?

12 A. I believe it does. I think that this is a
13 summary in their Microeconomics textbook which is
14 reaching a conclusion that's inconsistent with the much
15 earlier version that risk aversion prevails, and it's
16 specifying that risk aversion prevails in the domain of
17 gains but not in the domain of losses and that that
18 applies to executives making real decisions.

19 Q. Earlier, Professor, we talked about a quote
20 from Professor Arrow. I want to show you another quote
21 from Professor Arrow, CX 1770, and this comes from Risk
22 Perception in Psychology and Economics in Economic
23 Inquiry, Volume 20, Page 2.

24 "A striking real life situation has given
25 grounds for doubt as to the validity of the expected

1 utility hypothesis. Since 1969, the United States
2 Government has offered flood insurance at rates which
3 are well below their actuarial value. The intention
4 was to relieve the pressure for the Government to offer
5 relief when floods occurred. Under the usual
6 hypothesis of risk aversion, any individual should
7 certainly be willing to take a favorable bet, even more
8 because it offsets an otherwise fluctuating income.
9 Yet until the Government increased the pressure by
10 various incentives, very few took out this insurance."

11 How does this quote comport with prospect
12 theory?

13 A. Well, this is a domain where people can either
14 pay a sure loss, the insurance premium, or they can
15 risk a much larger loss, okay, and what we see is the
16 behavior is that in this insurance context, people are
17 opting to be risk seeking. They're being offered an
18 insurance policy at a favorable rate that from what I
19 understand offered them the opportunity for a positive
20 expected value purchase, because of the government
21 subsidy, but because this is in the domain of losses,
22 people are willing to take the risk. They're not
23 following the standard assumption of risk aversion.

24 Q. I'm now going to show you CX 1771. This is
25 another quote from Professor Arrow from the same

1 article. This was at page 5.

2 "I suggest that these failures of the
3 rationality hypothesis are in fact compatible with some
4 of the specific observations of cognitive
5 psychologists. I am drawing especially on the work of
6 Tversky and Kahneman (1974, 1981). They and others
7 have identified several heuristic devices by which
8 individuals form cognitive judgments and note that,
9 while each has useful properties, each can also lead to
10 biases in judgment."

11 Are you familiar with what work of Tversky and
12 Kahneman that Professor Arrow is referring to in this
13 book?

14 A. I am.

15 Q. And the 1981 citation, what work is that?

16 A. The 1981 paper has the Asian disease problem,
17 and it's the second of a trio of papers developing
18 prospect theory.

19 Q. And what do you understand Professor Arrow to
20 be saying in this quote?

21 A. I think my understanding from being in
22 discussions with Professor Arrow, from attending
23 conferences at the Stanford Center for Conflict and
24 Negotiation, is that Arrow was quite taken by the work
25 of Kahneman and Tversky in developing prospect theory,

1 and he updated his views from the point of the earlier
2 quote to this quote where he endorsed -- where he's
3 basically endorsing the views of Kahneman and Tversky,
4 and a number of years later, Arrow was a lead editor of
5 a book that included Professor Mnookin, Amos Tversky,
6 Lee Ross and Professor Wilson, the book Barriers to
7 Negotiated Agreement, and that book is a ringing
8 endorsement of the work of Amos Tversky and Daniel
9 Kahneman in the area of prospect theory.

10 Q. Now, have you heard criticisms of prospect
11 theory and the idea of framing decisions?

12 A. Early on in the development of prospect theory,
13 there were many issues raised, sort of will this work
14 with larger stakes, will this work with real money
15 gambles, will this apply to real world contexts? So,
16 those were all legitimate scientific questions, and my
17 read of the literature 23 years later is that this
18 result of risk aversion in the domain of gains, risk
19 seeking in the domain of losses, has held up at a
20 level -- at a remarkably strong level.

21 Q. Is it your understanding that Dr. Addanki
22 agrees with your opinion that people are risk seeking
23 over the domains of gains and -- I'm sorry, that people
24 are risk seeking over the domain of losses and risk
25 averse over the domain of gains?

1 A. My impression is that he was not in agreement
2 in that. In his testimony, he reached a conclusion
3 exactly opposite of that. He argued that people are
4 risk seeking in the domain of gains and risk averse in
5 the domain of losses.

6 JUDGE CHAPPELL: Mr. Kades?

7 MR. KADES: Yes, Your Honor.

8 JUDGE CHAPPELL: If I excluded a supplemental
9 report that was filed immediately before trial, why is
10 this witness talking about testimony?

11 MR. KADES: Well, Your Honor, because the
12 proffer would only be relevant to the degree it's
13 rebuttal. So, the proffer has to include what it is
14 that Professor Bazerman's rebutting, because even if,
15 as is our understanding of Your Honor's ruling, is that
16 even if you had found that the opinions were covered by
17 the original report, he would not be allowed to testify
18 unless those opinions were, in fact, true rebuttal.

19 JUDGE CHAPPELL: I believe, and the record will
20 be clear, my rulings were based on your failure to
21 comply with our discovery rules, not on whether or not
22 this was proper rebuttal. You did not demonstrate good
23 cause to be providing an expert report on the eve of
24 trial, as I recall.

25 MR. KADES: Yes, Your Honor, but it would seem

1 to me that we are under an obligation in the proffer to
2 lay a foundation for the admissibility of the evidence
3 on not just the ground that Your Honor ruled on but
4 should we get in front of the --

5 JUDGE CHAPPELL: What you are allowed to do,
6 Mr. Kades, is introduce evidence that I've excluded.
7 That's what you're allowed to do. So, proceed. I'm
8 not going to go on -- you know, make this a whole dog
9 and pony show and tie up hours of people's time. I
10 excluded an expert report. That expert report should
11 have been what you offered for your offer of proof.
12 So, I'm going to -- I've given you a lot of leeway
13 here, but I am not going to allow you to waste our
14 time.

15 How much more of this questioning do you think
16 you have?

17 I mean, your reason supporting your offer of
18 this testimony, that was given to me earlier. I saw
19 that, and I ruled on it accordingly. So, what you're
20 not supposed to be doing now is trying to get a second
21 run at that. There was a motion to exclude, there was
22 a response by you, and I ruled accordingly based on
23 what I had in front of me at the time.

24 Do you understand where I'm going logically
25 here?

1 MR. KADES: Your Honor, I understand, and this
2 was not an attempt to do that. It was my understanding
3 that if I -- that we needed to establish for the
4 Commission both that there would be -- what he would
5 have testified to and that -- and to establish the
6 proper evidentiary foundations, and in addition to
7 that --

8 JUDGE CHAPPELL: We don't have a trial de novo
9 on everything I exclude. I ruled on what I had in
10 front of me at the time, and that's all I can do, and
11 I'm not going to allow you to re-assert your reasoning
12 at this time. If you want to do it, go ahead.

13 I asked you how much more time you have left.
14 Let me know. Give me an estimate.

15 MR. KADES: Your Honor, if I could have a
16 moment, because I am -- based on your comments, I am
17 trying to figure out how to stay within the scope of
18 your ruling --

19 JUDGE CHAPPELL: Well, you have the floor. I'd
20 like for you to explain to me why you think you need to
21 introduce more bases or reasons for entering -- for me
22 admitting this evidence, something beyond what I had at
23 the time when I made my ruling. How is that logical
24 and why is that necessary? You may confer if you need
25 to.

1 MR. KADES: Your Honor, it's our opinion that
2 the defendants have made risk aversion an important
3 part of their defense, and we respectfully disagree
4 with Your Honor's ruling that the burden on us to
5 submit the supplemental report is one of requiring us
6 to show good cause, but -- and so we think that the
7 appropriate legal standard is one that has to do with
8 the balances of prejudice, and we think, therefore, a
9 proffer that explains to the Commission why we think
10 that the balances of prejudice here by not allowing the
11 testimony versus excluding it favor us, that they --
12 that we think it is important for the Commission to see
13 what the testimony would look like to understand the
14 implications of allowing the testimony of Dr. Addanki
15 to stand when we think it is well refuted by the
16 academic literature. So, that's why we're going into
17 the bases of the opinions of Professor Bazerman.

18 JUDGE CHAPPELL: Well, I understand why you
19 think the testimony should have been included, and I
20 don't recall -- it's been a few days -- all the bases
21 for my ruling, but did you not include all the reasons
22 supporting your offer at the time? You had your chance
23 when you filed your response, and what I'm saying is, I
24 don't believe you have any right or need to go beyond
25 the reasons that you stated in support of your position

1 at the time I made the ruling. You had your chance.

2 Is it your position -- is it the Government's
3 position that you have the right to bring in more
4 basis, more rulings, more argument in support of a
5 ruling that I made a few days ago?

6 MR. KADES: Your Honor, it's my understanding
7 when a proffer is made, the party has the right to
8 proffer the testimony that would have been given had
9 the evidence been allowed. That's all we are doing
10 here. We are not putting into the record argument. We
11 are not re-raising the Court's ruling, but we are --

12 JUDGE CHAPPELL: Well, I guess then where we
13 went down the wrong track was I thought I heard you say
14 in response to my first or second question that you
15 were putting in reasons why this should have been
16 allowed as rebuttal, because you're going into the
17 record of the trial, and the point I'm trying to make
18 is I don't see how you need to have a right to provide
19 reasons beyond the reasons that were stated in your
20 position papers at the time I made the ruling.

21 MR. KADES: Your Honor, I interpreted your
22 question as asking why we had chosen to have Professor
23 Bazerman give the same testimony we would have had him
24 give if the testimony had been allowed, but I do think
25 that the proffer does allow us to provide into the

1 record the testimony he would have given.

2 JUDGE CHAPPELL: Well, my ruling excluded the
3 supplemental report. I don't recall going beyond that.
4 I believe that's all that was in front of me, wasn't
5 it?

6 MR. KADES: Yes, and all the testimony that we
7 have gone through is related to his supplemental
8 report. His supplemental report dealt specifically
9 with prospect theory and the argument made by
10 defendants that we could assume corporations were risk
11 averse, and in -- in that supplemental report, he
12 discussed the article by Kahneman and Tversky that he
13 cited. He discussed his own work. He did not discuss
14 the Babcock, Lowenstein article about the application
15 of prospect theory to settlement, but I think it's
16 clearly within the scope of that opinion, that when
17 facing the domain of losses, people are risk seeking,
18 not risk averse, but I do think we are well within the
19 scope of the opinion that was excluded.

20 JUDGE CHAPPELL: Well, as long as you're within
21 the scope, I just -- as I said earlier, I don't
22 understand the logic of how if you're trying to bring
23 in more justification that you were right and I was
24 wrong, I don't see how the Commission or any appellate
25 court can logically fault me for making a ruling or

1 disagree with a ruling if they have evidence in front
2 of them that I did not have when I made my decision.

3 Go ahead.

4 MR. KADES: Thank you, Your Honor.

5 BY MR. KADES:

6 Q. I believe we were talking about Dr. Addanki's
7 testimony.

8 A. Um-hum.

9 Q. Now, how many studies are you aware of have
10 been conducted examining the validity of prospect
11 theory?

12 A. A couple hundred. There's a couple of meta
13 analyses by Professor Kuhberger, and I personally have
14 read approximately 40 studies that explore prospect
15 theory.

16 Q. And what is your conclusion based on about the
17 meta analysis that you read and the specific studies
18 you reviewed as to the conclusion about prospect
19 theory?

20 A. My reading of the literature is that prospect
21 theory has been remarkably robust, that the predictions
22 have upheld the scrutiny of many of the early
23 criticisms, that the concepts generalize to many
24 domains, and that the findings that people tend to be
25 risk averse in the domain of gains and risk seeking in

1 the domain of losses is a very solid conclusion.

2 Q. Are you aware of any studies that had results
3 consistent with Dr. Addanki's view that people are risk
4 averse when facing losses?

5 A. I -- I can think of no study that reaches the
6 conclusion that people are risk averse in the domain of
7 losses that's -- that's tested within the overall
8 framework of prospect theory.

9 Q. Now --

10 A. I guess I would add to it, I can -- I can come
11 up with studies where there is a finding of risk
12 aversion in certain domains. For example, in
13 insurance -- people do buy insurance policies where
14 they're risk averse in the domain of losses, but that's
15 not really an appropriate comparison to the Kahneman
16 and Tversky work, because in that case the main reason
17 that people are risk averse in the domain of losses for
18 insurance policies is it's in domains where they
19 dramatically overestimate the probability of the loss
20 coming through.

21 So, salespeople are very good at leading people
22 to buy useless warranties by having them envision a
23 tragedy scenario. So, that would be an example where
24 people are risk averse in terms of their behavior, but
25 their reasoning isn't -- doesn't have to do with their

1 risk decision that they're making; rather, their
2 miscalculation of the likelihood of a bad loss actually
3 occurring.

4 Q. Are you familiar with -- did you review Dr.
5 Addanki's testimony where he relies on the fact that
6 people who purchase lottery tickets is evidence that
7 people are risk seeking over the domain of gains?

8 A. I did. I did see that.

9 Q. What is your opinion of Dr. Addanki's position?

10 A. I disagree with the logic that he uses for a
11 couple of reasons. One, just like people do buy
12 insurance because they overestimate the probability of
13 the bad event coming in, it is -- it's substantial
14 evidence that people overestimate the likelihood that
15 they're going to win a lottery. So, people aren't
16 working with a well-calibrated bet to begin with.

17 But the other issue is that lottery tickets
18 aren't purely in a domain of gain. They're a mixed
19 situation. That is, when you buy your lottery ticket,
20 there is a very high probability that you're going to
21 obtain a loss and a low probability that you're going
22 to get a very big gain. So, it's not a problem that is
23 scientifically categorized as a decision under the
24 domain of gains to begin with.

25 Q. Professor Bazerman, do you have an

1 understanding as to Dr. Addanki's view as to the frame
2 Schering-Plough was in at the time it negotiated these
3 settlement agreements?

4 A. My understanding of his testimony that -- is
5 that he did view Schering-Plough as being in a -- in a
6 loss domain because they would be losing market share,
7 and from that, he infers that in this loss frame, risk
8 aversion is the likely conclusion.

9 Q. Do you agree that it's likely Schering was in a
10 loss frame in negotiating these settlements?

11 A. I do. My experience in the pharmaceutical
12 industry, talking to incumbents, is that they are
13 obsessed with the market share losses that are going to
14 occur against the status quo.

15 Q. Is there research to suggest that the status
16 quo is a likely reference point from which people
17 measure future events?

18 A. Absolutely. A classic reference would be a
19 paper by Samuelson and Zeckhauser where they suggest
20 that the status quo forms the basis by which we look at
21 situations as either offering gains or losses. In that
22 context, the incumbent has a certain market share. A
23 generic entrant is obviously a loss in comparison to
24 the status quo.

25 Q. And is that article entitled "Status Quo Bias

1 in Decision Making"?

2 A. It is.

3 Q. And do you know where that was published?

4 A. I believe I have it here.

5 Q. Actually, I don't think that one's in your
6 binder, Professor.

7 A. Okay, I'm sure that I've referenced it many
8 times, and it would be on my web site, but I don't
9 remember the location.

10 Q. Did you cite it in your supplemental report?

11 A. I did.

12 Q. Would it help you refresh your recollection if
13 you could look at your supplemental report?

14 A. It would.

15 MR. KADES: Your Honor, may I approach?

16 JUDGE CHAPPELL: Yes.

17 BY MR. KADES:

18 Q. Professor Bazerman, I'm handing you what's been
19 marked CX 1790. Is that your supplemental report?

20 A. It is.

21 Q. I think if you'd turn to page 5, if you could
22 review that and tell me whether that refreshes your
23 recollection when and where the Samuelson and
24 Zeckhauser paper was published.

25 A. It does. It was published in 1988. It was

1 entitled "Status Quo Bias in Decision Making" in the
2 Journal of Risk and Uncertainty.

3 Q. And if Schering were in the -- viewed the
4 uncertainty related to the patent litigation to be one
5 of facing uncertain loss, what does prospect theory
6 suggest as to Schering's risk preference in that
7 situation?

8 A. To the extent that they moved away from risk
9 neutrality, the strong preference is that they would
10 move in the direction of risk seeking behavior.

11 MR. KADES: Your Honor, I have no further
12 questions.

13 (End of proffer.)

14 JUDGE CHAPPELL: Okay, the preceding questions
15 were an offer of proof by complaint counsel based on a
16 previous ruling I made excluding a supplemental expert
17 report for the reasons I stated in the record at the
18 time.

19 Cross?

20 MR. GIDLEY: Yes, Your Honor.

21 JUDGE CHAPPELL: At this time, just give me an
22 estimate of how much you have.

23 MR. GIDLEY: I used to have a lot more, Your
24 Honor. I'd say right now I'm looking at 45 minutes,
25 and I'm actively cutting mentally. If we take our

1 morning break, I'll probably continue to cut this down.

2 JUDGE CHAPPELL: That's a pretty good
3 incentive, then. Why don't we -- let's take our lunch
4 break until -- let's go until 1:15. Thank you.

5 (Whereupon, at 12:10 p.m., a lunch recess was
6 taken.)

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1 AFTERNOON SESSION

2 (1:15 p.m.)

3 JUDGE CHAPPELL: Mr. Gidley, whenever you're
4 ready.

5 MR. GIDLEY: We're ready, Your Honor.

6 CROSS EXAMINATION

7 BY MR. GIDLEY:

8 Q. Good afternoon, Professor Bazerman. How are
9 you?

10 A. Good. Good afternoon to you.

11 Q. We talked earlier during the objections about
12 whether or not you are an industrial organization
13 economist. You are not, sir. Is that correct?

14 A. I am not an industrial organization economist.

15 Q. And you have no experience as an antitrust
16 enforcer. Is that correct?

17 A. That's correct.

18 Q. And you have no experience or expertise in the
19 area of economics -- antitrust, economics or law, do
20 you, sir?

21 A. I do not.

22 Q. Sir, you have never criticized in print the
23 rule of reason, have you, sir?

24 A. I have not.

25 Q. In fact, sir, you've never studied the rule of

1 reason that's used in antitrust law cases, have you,
2 sir?

3 A. That's correct.

4 Q. Sir, I believe I understood you on direct to
5 say that you were assuming that Dr. Levy's report is
6 correct. Did I understand that correctly?

7 A. I meant to convey that I was asked to make the
8 assumption from the FTC that the \$60 million was
9 excessive for the licenses and that I assumed that in
10 my analysis, in my expert report and everything else
11 I've done as requested by the FTC.

12 Q. Well, sir, I understood your direct testimony
13 to be that the \$60 million was excessive in Dr. Levy's
14 view for Niacor-SR. Isn't that what you testified to,
15 sir?

16 A. I assumed -- my read of Dr. Levy's expert
17 report was that he concluded that the \$60 million was
18 excessive for the entire group of licenses that were
19 part of that agreement.

20 Q. All right, sir, but Dr. Levy's report doesn't
21 say that, does it, sir?

22 A. My understanding is that that was Dr. Levy's
23 conclusion.

24 Q. Sir, you haven't done your own quantitative
25 analysis of the six products that were licensed to

1 Schering by Upsher-Smith, have you, sir?

2 A. I have not.

3 Q. You can't tell me whether those licenses were
4 worth collectively \$30 million, \$60 million or \$90
5 million based on any of your own economic valuation
6 work, correct?

7 A. That is correct.

8 Q. And you express no opinion as to whether or
9 not, based on your own work, whether \$60 million was
10 excessive for the six product licenses that Upsher
11 granted to Schering. Isn't that correct?

12 A. That is correct. I was asked to make that
13 assumption. I was not asked to perform that analysis.

14 Q. Sir, you weren't here yesterday when Dr. Levy
15 testified in Open Court, were you, sir?

16 A. I was not.

17 Q. And you understand, sir, that in addition to
18 Niacor-SR, there are five other drugs that were
19 licensed to Schering? Do you understand that, sir?

20 A. I do.

21 Q. All right. And sir, do you also understand
22 that there were six supply contracts contained in the
23 June 1997 agreement, sir?

24 A. I do not recall the details of the supply
25 contracts. I did read the agreement -- the agreement

1 that you mentioned, but I do not recall the details of
2 the supply contracts that you are now referring to.

3 Q. Now, there wasn't a single \$60 million payment
4 in this case, was there, sir?

5 A. What you're saying is correct is my
6 understanding. It was a set of timed payments.

7 Q. There were actually three payments, correct,
8 sir?

9 A. That's my understanding.

10 Q. And the net present value as of June of 1997 of
11 three payments over a two-year period is less than \$60
12 million, is it not, sir?

13 A. Yes.

14 Q. In many cases, sir, is it reasonable for a
15 pharmaceutical company to do a discounted cash flow
16 valuation?

17 A. Yes.

18 Q. In your meetings with pharmaceutical executives
19 during which you have done these executive seminars and
20 training, has any executive expressed the view that
21 discounted cash flows are junk or garbage or worthless
22 or words to that effect?

23 A. I have never heard words to that effect.

24 Q. Now, Dr. Levy assumes that the \$60 million
25 payment, the so-called \$60 million payment, was

1 noncontingent. Are you aware of that, sir?

2 A. Yes.

3 Q. And you yourself haven't done any investigation
4 as to whether or not, for instance, under New Jersey
5 law, whether the \$60 million truly was contingent or
6 noncontingent as a matter of law, have you, sir?

7 A. I have been working under the assumption that
8 the \$60 million was noncontingent and that there were
9 smaller pieces of the contract that were contingent.

10 Q. And noncontingent payments are common in the
11 pharmaceutical industry, are they not, sir?

12 A. Noncontingent -- part of -- most of -- part of
13 many agreements cross lots of domains, including this
14 domain. It's often the case that a party buying
15 something pays the seller some fixed amount of money,
16 yes.

17 Q. And sir, specifically with reference to the
18 amount of \$60 million, you're aware, sir, based on your
19 own consulting of licenses in excess of \$60 million,
20 are you not, sir?

21 MR. KADES: Objection, Your Honor, I think this
22 goes a little beyond the scope of the direct testimony
23 and the opinions offered in the direct testimony. We
24 didn't talk at all about -- in fact, he was implicitly
25 assuming the \$60 million payment in this case was not

1 for the licenses.

2 MR. GIDLEY: Your Honor, all I want to do is
3 test the bases of that assumption, and this witness
4 knows of information that bears on the reasonableness
5 of the assumption of the \$60 million. I'd like to
6 elicit that in that question.

7 JUDGE CHAPPELL: Are you saying that the \$60
8 million was irrelevant to his opinion?

9 MR. KADES: I'm saying that he was given as an
10 assumption that the \$60 million was not for the
11 licenses.

12 JUDGE CHAPPELL: So, you're saying it was an
13 assumption that he based his opinion on?

14 MR. KADES: Yes, it was an assumption we gave
15 him, and it's --

16 JUDGE CHAPPELL: I'll allow it. Overruled.

17 THE WITNESS: Could you repeat the question,
18 please?

19 BY MR. GIDLEY:

20 Q. I'd be pleased to.

21 Sir, in your work in consulting and teaching in
22 the pharmaceutical industry, are you not aware of
23 instances where licenses have had a noncontingent cash
24 payment in excess of \$60 million?

25 A. I can think of another example that included a

1 noncontingent payment as part of a broader contract,
2 including significant contingent payments, where the
3 noncontingent piece was in excess of \$60 million.

4 Q. In excess of \$60 million?

5 A. Correct.

6 Q. Thank you. Sir --

7 MR. KADES: Objection, Your Honor, we would ask
8 that that testimony, if it's coming in for the basis,
9 should not be coming in for the truth of the matter, if
10 he's just testing the reasonableness of the assumption.

11 MR. GIDLEY: Your Honor, we're testing whether
12 or not it was reasonable for this witness to assume Dr.
13 Levy's opinion was correct, and Dr. Levy's trial
14 testimony is to the extent that there are no such
15 payments beyond \$60 million or words to that effect,
16 something that Dr. Bazerman didn't see yesterday. It's
17 relevant to this trial whether Dr. Bazerman, in the
18 course of his consulting, knows facts to the contrary.

19 MR. KADES: And our position, Your Honor, just
20 to be clear, is that his knowledge of a \$60 million
21 payment should not -- that should not -- his knowledge
22 that there have been payments of greater than \$60
23 million, that should not be able to be cited as a fact
24 that there are payments greater than \$60 million.

25 MR. GIDLEY: And our position is, Your Honor,

1 if he wants to impeach Dr. Bazerman, he can do that on
2 redirect.

3 JUDGE CHAPPELL: I'm not sure that the answer
4 hurts anyone. It's pretty vague, and it doesn't say,
5 unless I've missed something, it doesn't say in the
6 pharmaceutical industry, it doesn't say whether it's
7 for a pro football team, for apple butter or anything
8 else. So, I'll overrule the objection.

9 Go ahead.

10 MR. GIDLEY: Your Honor, just so our record is
11 clear, I intended to ask him in the pharmaceutical
12 industry. May I do that now, Your Honor? That's
13 exactly the context of my question.

14 JUDGE CHAPPELL: That is not what you asked
15 him. You may ask him that now, but I'm not saying you
16 may not hear an objection.

17 MR. GIDLEY: Understood, Your Honor.

18 JUDGE CHAPPELL: Go ahead.

19 BY MR. GIDLEY:

20 Q. Sir, the answer you just gave, was that in the
21 pharmaceutical industry, the license that you described
22 being in excess of \$60 million, sir?

23 MR. KADES: Objection to the degree this is
24 being offered for the truth of the matter.

25 MR. GIDLEY: Your Honor, not only do we think

1 it's admissible for the truth of the matter asserted,
2 it's also admissible for the state of mind of industry
3 executives of what is reasonable in the pharmaceutical
4 industry.

5 JUDGE CHAPPELL: I'm going to sustain the
6 objection, but on my basis, because I don't think
7 there's foundation been laid for him to answer that
8 question. If you are going to ask that, you are going
9 to have to demonstrate that he has some reason to know
10 what that answer is.

11 MR. KADES: Your Honor, we would ask in this
12 case if he is going to lay a foundation that it is
13 beyond the scope of the direct and he should be
14 required to use nonleading questions.

15 JUDGE CHAPPELL: I haven't agreed that it's
16 beyond the scope, Mr. Kades. He's testing the
17 assumption. You told me this was an assumption in the
18 opinion. So, it's not beyond the scope for that
19 purpose. And -- well, I'll allow some leeway. I'm not
20 saying he can't lead the witness at all. So, I'll
21 overrule the objection. Go ahead.

22 BY MR. GIDLEY:

23 Q. Professor Bazerman, in your consulting work in
24 the pharmaceutical industry, is it the case that you
25 spend two to three weeks a year in that industry, the

1 pharmaceutical industry, giving executive seminars and
2 teaching?

3 A. No, I spend less days than two to three weeks
4 a -- oh, two to three weeks? Yes, that's accurate.

5 Q. And sir, in the course of that work -- and
6 you've been doing this how many years in the
7 pharmaceutical industry?

8 A. I've worked extensively in the pharmaceutical
9 industry for the last 15 years.

10 Q. All right. And in fact, your expert report
11 lists a number of pharmaceutical industry clients.
12 Isn't that correct?

13 A. That is correct.

14 Q. All right, sir. And in the course of that
15 consulting work, have you become familiar with
16 transactions in the pharmaceutical industry?

17 A. Yes, I have.

18 Q. And indeed, isn't one of the reasons for your
19 executive seminars to make executives in the
20 pharmaceutical industry more effective negotiators in
21 licensing and purchasing and other transactions?

22 A. That's correct.

23 Q. And in the course of those contacts and that
24 teaching experience, have you come to learn about
25 certain transactions in the industry?

1 A. Yes.

2 Q. And is it in that connection, sir, that you've
3 learned about a transaction in excess of \$60 million in
4 the pharmaceutical industry as an up-front cash
5 noncontingent portion?

6 A. Yes, in a situation that involved a substantial
7 contingent component as well.

8 Q. Sir, you testified about being an expert in
9 managerial decision making on direct. Is that correct?

10 A. Yes.

11 Q. Now, the decisions that were made in this case
12 should be evaluated based on the information available
13 to the decision makers at Upsher-Smith and Schering as
14 of June 1997, correct?

15 A. Yes.

16 Q. And we should look at the June 1997 agreement
17 in light of the information that the parties had or had
18 available as of June 1997, correct?

19 A. Yes.

20 Q. Now, sir, you testified on direct that you
21 reviewed Dr. Bresnahan's expert report. Is that
22 correct?

23 A. I did.

24 Q. And you did that in connection with writing
25 your expert rebuttal report in this case, sir?

1 A. That is correct.

2 Q. And sir, you don't endorse the specific
3 three-part test of Professor Bresnahan as the
4 appropriate end result that the FTC should end up with,
5 do you, sir?

6 A. I -- much of that three-part test that was
7 represented to me by you in deposition as representing
8 the Bresnahan test is outside of my expertise. I claim
9 expertise in understanding the economics of
10 negotiations, but there were components that had to do
11 with monopoly power that I do not claim expertise in,
12 so I neither agree with nor disagree with the test that
13 you labeled as Professor Bresnahan's.

14 Q. But sir, my question is, you don't endorse the
15 specific three-part test that Dr. Bresnahan laid out as
16 the appropriate end result that the FTC should end up
17 with, do you, sir?

18 MR. KADES: Objection, Your Honor, I think this
19 goes beyond the scope, the testimony and the expertise.
20 Mr. Gidley made a strong objection when the proffer was
21 made that Professor Bazerman is not an IO economist.
22 Now he's asking him a question that goes directly to
23 the expertise of an IO economist.

24 MR. GIDLEY: Your Honor, prongs one and two are
25 outside this witness' expertise. He testified in the

1 deposition about prong three. I think the witness
2 understands the context of his own limits.

3 JUDGE CHAPPELL: But how did he testify about
4 it in his direct?

5 MR. GIDLEY: In his direct, he said that he
6 relied on Professor Bresnahan for certain assumptions,
7 including assumptions about monopolization, as well as
8 assumptions about the agreement and whether there was a
9 payment for delay.

10 JUDGE CHAPPELL: Well, I am going to allow you
11 to inquire into the assumptions that go into his
12 opinions. Overruled.

13 THE WITNESS: Can I have your question again,
14 please?

15 BY MR. GIDLEY:

16 Q. I'd be very pleased to repeat it.

17 Sir, you don't endorse the specific three-part
18 Bresnahan test as the appropriate end result that the
19 FTC should end up with.

20 A. I would -- in answering the question, to be
21 sure I answered it clearly, I'd like to review that
22 test that you're referring to.

23 Q. I'd be happy to do that. We provided you with
24 a binder of exhibits in just such an eventuality.

25 Sir, would you go to tab 4? That's the

1 Bresnahan test, and all we did was reproduce page 22,
2 Section M, of the Bresnahan test. Your binder also
3 includes the Bresnahan report if you want to go
4 directly to the Bresnahan report, sir.

5 A. I'm -- looking under tab 4, I neither endorse
6 nor disagree with this test, because I view responding
7 to the first two pieces of the test as outside my
8 expertise.

9 Q. Very good. Let's go to a new topic.

10 Sir, in your work in negotiations, isn't it
11 common that negotiators do not fully reveal all of the
12 information that they possess?

13 A. Yes.

14 Q. You agree that generally, at the end of a
15 negotiation, each side does not necessarily know all of
16 the information that the other side had available,
17 correct?

18 A. That's correct.

19 Q. And sir, I take it you believe that there is
20 often hostility when the parties are locked in a
21 litigation context. Is that correct?

22 A. There is sometimes hostility and sometimes
23 there's not.

24 Q. All right, but it's frequent that there is
25 hostility among the parties.

1 A. "Often" and "frequent" imply a probability, so
2 I'm avoiding answering that question, because I don't
3 know what you mean by those terms. So, I'm responding
4 to sometimes, which I'm comfortable as being an
5 accurate statement.

6 Q. Sir, I'm not making up the word "hostility." I
7 read it in your report in the specific context of the
8 Upsher-Smith/Schering-Plough case.

9 A. Um-hum.

10 Q. Do you remember writing that in your report?

11 A. I remember writing about the hostility between
12 the parties, yes.

13 Q. And you perceived some hostility between the
14 parties?

15 A. I read that in other expert report documents.
16 I don't remember the -- exactly where I read that, but
17 I read that as I was preparing my expert report.

18 Q. Sir, in your experience, does the negotiation
19 skill level of negotiators influence the outcome of
20 negotiations?

21 A. Yes.

22 Q. And the world has both good and skilled
23 negotiators and less skilled negotiators. Is that your
24 experience?

25 A. I think that people have a continuum of skill

1 levels.

2 Q. Sir, you mentioned in your expert report that
3 you reviewed the work of Dr. Kerr. Is that correct?

4 A. I did.

5 Q. And sir, in your report, you did not provide a
6 specific critique of Dr. Kerr's expected litigation
7 outcome timing model in your report, did you, sir?

8 A. I do not recall commenting on that.

9 Q. And you didn't comment on it today, did you,
10 sir?

11 A. I did not. Well, I guess -- I -- going back
12 two questions, just to make the record as clear as
13 possible, I do recall in my expert report making a very
14 general comment having to do with the expert reports
15 that I read.

16 Q. And my question went to the specifics of his
17 litigation outcome model based on his study of IP
18 litigation. You don't critique that or provide
19 criticism of that particular model, do you, sir, in
20 your report?

21 A. I do not remember referring specifically to Dr.
22 Kerr's report. I read Dr. Kerr's report in late
23 October, and to the extent that risk aversion was a
24 significant part of it, I have commented on risk
25 aversion as part of the economic analyses provided by

1 the four expert witnesses for Schering-Plough and
2 Upsher-Smith.

3 Q. Professor Bazerman, you are not an expert in
4 the Hatch-Waxman Act, are you, sir?

5 A. I am not.

6 Q. And you have not evaluated, for instance, the
7 changes in economic incentives that the Hatch-Waxman
8 Act might make on branded or generic firms. Is that
9 correct?

10 A. I have not done that.

11 Q. And you yourself didn't assess the
12 reasonableness of the September 1, 2001 entry date
13 that's contained in the Schering/Upsher-Smith
14 agreement, did you, sir?

15 A. I did not.

16 Q. And sir, you have not assessed the merits of
17 the underlying patent suit. Is that correct?

18 A. That's correct.

19 Q. And in conducting your work on this case, you
20 didn't study any of the negotiating history between
21 Schering-Plough and Upsher-Smith. Is that correct?

22 A. I did not.

23 Q. You didn't review the testimony of Ian Troup.
24 Is that correct?

25 A. That's correct.

1 Q. You haven't reviewed any of the trial testimony
2 of Ian Troup or Paul Kralovec or the representatives
3 from Schering-Plough. Is that correct?

4 A. That's correct.

5 Q. You haven't studied the course of the
6 negotiations in any way. Isn't that correct?

7 A. What you're saying is correct.

8 Q. And sir, in conducting your work on this case,
9 you didn't study, for instance, the negotiating history
10 of Pacerone, did you, sir?

11 A. No, I did not.

12 Q. Sir, prior to your work in this case, you don't
13 recall ever hearing of the topic of reverse payments.
14 Isn't that correct?

15 A. I do not recall hearing the phrase "reverse
16 payment."

17 Q. Let me take this off the ELMO.

18 Professor Bazerman, creative negotiations that
19 achieve mutual gains are generally beneficial to
20 society, aren't they?

21 A. Yes, they are.

22 Q. Processes that lead disputants to settle their
23 disputes are generally preferable to obtaining
24 resolution in court, aren't they?

25 A. Yes.

1 Q. Litigation is costly to the disputants, is it
2 not?

3 A. In most cases I would assume that that's
4 accurate.

5 Q. And the money spent on lawyers or on expert
6 witnesses trades off in the pharmaceutical industry
7 with things like R&D or marketing or discounts, doesn't
8 it, sir?

9 A. At some very general level it must.

10 Q. You are familiar with the concept of
11 opportunity costs, sir?

12 A. I am.

13 Q. And opportunity costs are a real phenomenon
14 within the American corporation, are they not, sir?

15 A. Absolutely.

16 Q. And the pharmaceutical industry isn't any
17 different, is it, sir?

18 A. I don't see any reason to see the
19 pharmaceutical industry differently.

20 Q. You testified on direct about self-serving
21 bias. Do you remember that testimony?

22 A. I do.

23 Q. And sir, this business of self-serving bias,
24 does that also affect expert witnesses?

25 A. Absolutely.

1 Q. And does it also affect government lawyers?

2 A. I -- I think it affects people, so it would
3 affect every individual in this room to some degree.

4 Q. And isn't it the case that having live
5 testimony is one of the ways that the Anglo-Saxon
6 jurisprudence system deals with self-serving bias, so
7 that the finder of fact, in this case the Court but
8 sometimes a jury, can assess the performance of the
9 witnesses live and assess their credibility? Isn't
10 that a response of the judicial system to self-serving
11 bias?

12 A. You're asking -- I -- your question asks me to
13 tell you how we got here? That I -- is well beyond my
14 expertise. I can certainly see how this forum helps
15 the -- helps the Court understand what might be
16 self-serving, and I think that we can also identify
17 conditions under which people are more or less likely
18 to act in a self-serving manner.

19 Q. And some of that can be done by meeting them or
20 watching them or observing their behavior live. Isn't
21 that correct, sir?

22 A. To a small degree. I mean, one of the
23 pernicious aspects of self-serving biases is that I'm
24 arguing that people have these biases without being
25 aware of them. So, the result is that clinically

1 diagnosing that would be very tough to do. So, do I
2 think that observing people, understanding their
3 context is useful? Absolutely. But I don't think that
4 we easily diagnose self-serving biases on an
5 incident-by-incident basis.

6 Q. Sir, you've done no systematic study of the
7 Hatch-Waxman Act, have you, sir?

8 A. No.

9 Q. And you, sir, haven't studied, for instance, a
10 number of ANDA litigations, A-N-D-A litigations, that
11 have occurred under the Hatch-Waxman Act in testifying
12 this morning. Isn't that correct?

13 A. I have not -- what you're saying is correct, I
14 have not investigated the issues that you've described.

15 Q. Sir, you testified on direct about this
16 business of economic incentives and how they may affect
17 action and whether a law-abiding -- whether people will
18 obey the law. Do you recall that general thread of
19 testimony, sir?

20 A. I do.

21 Q. Now, sir, is it your testimony based on your
22 laboratory work and your general work in the managerial
23 field that a single economic incentive will invariably
24 lead to action?

25 A. Certainly not. Economics is a social science

1 that provides a general pattern of expected behavior
2 rather than clear answers on any one specific episode.

3 Q. Do you believe that sometimes human beings are
4 motivated to do the right thing merely because it's the
5 right thing?

6 A. Absolutely.

7 Q. In other words, for instance, the existence of
8 a lost and found, it might be your economic incentive
9 to hold onto the purse, but because you generally want
10 to help another person and it's the right thing, you
11 turn the purse in. Is that an example?

12 A. I would expect most people would turn the purse
13 in and a small number would unfortunately not.

14 Q. You spend a lot of time in executive seminars.
15 Do you find, sir, in general, particularly with
16 reference to the business executives you meet, do you
17 find the majority of them are trying to do the right
18 thing?

19 A. I think that the majority of the executives
20 that I work with avoid engaging in unethical behaviors.
21 A moderate but -- a small to moderate number, in fact,
22 do engage in unethical behaviors that I even see in the
23 artificial environment of the classroom.

24 Q. And sir, in your experience, do you believe
25 that there are a disproportionately large number of

1 executives in the pharmaceutical industry that are
2 prone not to do the right thing?

3 A. I would assume that the pharmaceutical industry
4 is a good representation of industry in general,
5 primarily honest people, a small number of people who
6 are not.

7 Q. But being in the pharmaceutical industry by
8 itself is not something that you think is evil and, in
9 fact, you do work for that industry, right?

10 A. I do not find the pharmaceutical industry to be
11 evil.

12 Q. Now, sir, as I understood your expert report,
13 you took a look at some other expert reports, and you
14 also took -- or you at least had available to you the
15 June 1997 agreement between Upsher and Schering-Plough.
16 Is that right?

17 A. That is correct.

18 Q. Sir, did you study the board of directors memo
19 that went to the Schering-Plough board of directors in
20 this case?

21 A. Was that part of the -- was that in the
22 document you just described?

23 Q. I don't believe it's listed there, sir. Do you
24 know whether you looked at it?

25 A. I do not believe I looked at it.

1 Q. Did you consider in arriving at your testimony
2 in this case the decision that was made by the
3 Schering-Plough board of directors in June of 1997, the
4 actual decision-making process?

5 A. No.

6 Q. This business of managerial decision making, do
7 you ever talk about ethics at the Harvard Business
8 School or in your executive seminars?

9 A. I do.

10 Q. And sir, in general, is ethics a goal or a
11 topic that's promoted at the Harvard Business School?

12 A. Many professors would promote engaging in
13 ethical behavior. I'm not part of any systematic
14 effort to provide people with what their specific
15 ethics would be. When I deal with ethics, I typically
16 spend more time talking about the social science of
17 ethical behavior than prescribing rules of conduct to
18 my adult students.

19 Q. Do you know a professor at the Harvard Business
20 School named Regina Herzlinger?

21 A. I know the name. I have never met her.

22 Q. In arriving at your opinion in this case, did
23 you take into account that she sat on the Schering
24 board in June of 1997 as a director?

25 A. I did not take that into account nor do I know

1 that as a fact.

2 Q. Let me direct your attention within the binder
3 of exhibits -- and I believe, sir, your report is found
4 at tab 1.

5 A. Uh-huh.

6 Q. And for the record, that's CX 755. May I
7 direct your attention, sir, to the list of materials
8 that you reviewed and analyzed.

9 A. Um-hum.

10 Q. That list appears at page 2 of CX 755. Is that
11 correct?

12 A. I see it there, yes.

13 Q. And this is your report. Is that correct?

14 A. That is correct.

15 Q. And you did review and analyze these documents,
16 sir?

17 A. I did.

18 Q. And specifically, sir, you reviewed the expert
19 report of Professor Willig, Ordoover, Kerr, Addanki,
20 Mnookin and O'Shaughnessy. Is that correct?

21 A. That is correct.

22 Q. And sir, when you did that, was that before you
23 wrote this report at November 15, 2001?

24 A. It is. I read every document listed from 1 to
25 11 before I wrote the report.

1 Q. And sir, those six expert reports that I just
2 listed, were the copies that you were provided
3 complete? Did they basically seem to have every page
4 within the report?

5 A. I don't recall any missing pages. So, is it
6 possible that there was an appendix that I didn't see?
7 That's possible, but I -- nothing jumped out at me as I
8 was missing something as I went through those reports.

9 Q. Sir, you testified on direct -- you made a
10 reference to clinical trials. Do you remember making
11 that reference?

12 A. As an analogy, I recall doing so, yes.

13 Q. Right. You yourself have never run a clinical
14 trial, have you?

15 A. Well, it depends on whether you call
16 experiments on how people make decisions clinical
17 trials or not.

18 Q. I can ask a more precise question.

19 A. Okay.

20 Q. Have you ever run clinical trials in connection
21 with safety and efficacy testing of a pharmaceutical?

22 A. No.

23 Q. You've never supervised that, have you?

24 A. No.

25 Q. Sir, have you worked any significant time in a

1 corporation outside of academia?

2 A. What's "significant"?

3 Q. Well, what I mean is have you ever had a paid
4 salary position, you know, for more than a trivial
5 amount of time, for a month or something, for a
6 corporation as opposed to an academic position?

7 A. Well, between my freshman and sophomore year, I
8 had a --

9 Q. Let's exclude summer jobs.

10 A. Then I have never had a full-time corporate
11 position.

12 Q. All right. Sir, you testified about a
13 phenomenon that you call parasitic integration. Do you
14 recall that testimony?

15 A. I do.

16 Q. And this was an article that you wrote in 1997.
17 Is that correct?

18 A. It may have been written in 1996, but it
19 appeared in 1997.

20 MR. GIDLEY: May I approach, Your Honor?

21 JUDGE CHAPPELL: Yes, you may.

22 BY MR. GIDLEY:

23 Q. Professor Bazerman, you've been handed what's
24 been marked for the record as USX 1658. Do you see
25 that?

1 A. I do.

2 Q. And you're holding that in your hand?

3 A. I am.

4 Q. Would you identify this for the record, please,
5 sir?

6 A. This is -- appears to be a copy of the paper
7 called "Parasitic Integration" that I wrote with James
8 Gillespie and referred to earlier today.

9 Q. Well, sir, if I could, I'd like to direct your
10 attention towards the back of the article. Directing
11 your attention to the second yellow highlighted passage
12 from the Negotiation journal, July 1997, at page 280,
13 you wrote:

14 "The term parasitic suggests the occurrence of
15 victimization, and indeed, this article focuses on
16 cases in which the interests of a subset of negotiators
17 is impaired. However, there are cases in which absent
18 or third parties are hidden beneficiaries of the
19 negotiations (i.e., symbiotic integration or
20 'beneficial' parasitic integration)."

21 Do you see that?

22 A. I do.

23 Q. And that means, sir, that sometimes the third
24 parties that aren't at the bargaining table actually
25 benefit from the negotiations. Isn't that correct?

1 A. I'm sure that that's the case, that there are
2 times when two parties reach an agreement and someone
3 else benefits because they reached an agreement.

4 Q. Now, sir, you testified on direct about an
5 example of an oligopoly, and that example is found on
6 page 275, is it not, sir?

7 A. I'll need to turn there. Yes.

8 Q. Now, I didn't hear on direct the next example
9 which relates to the second Berlin crisis, does it not,
10 sir?

11 A. I am looking at the bottom of the yellow
12 highlighted material having to do with the Berlin
13 crisis, yes.

14 Q. And I'd like to direct your attention to that.
15 This is at page 275.

16 "Examining the implication of cooperation for
17 parasitic integration further, consider the 1961
18 settlement between the United States and the Soviet
19 Union that ended the second Berlin crisis. President
20 John F. Kennedy articulated three bedrock principles
21 for ensuring an American presence in West Berlin and
22 expressed U.S. resolve to use military force if
23 necessary to defend those principles. Yet Kennedy also
24 voiced flexibility.

25 "The agreement between the United States and

1 the Soviets contained a parasitic component. The
2 citizens of East Germany were the unmentioned
3 stakeholders who were victimized by this parasitic
4 agreement."

5 Do you see that?

6 A. I do.

7 Q. And sir, in your scholarly literature here, do
8 you think that this example is complete?

9 A. I'm not sure what you're asking me with the
10 word "complete."

11 Q. Well, sir, I don't see any mention here of some
12 of the other things that President Kennedy was
13 weighing. He was also weighing the threat of nuclear
14 war and some other security issues, wasn't he?

15 A. Oh, in this example I do not mean to argue that
16 President Kennedy made a bad decision.

17 Q. Or that he was a parasite?

18 A. Well, he wouldn't be the parasite, so I'm -- I
19 don't believe I've accused anybody of being a parasite.
20 I've talked about a -- the quality of a value-creating
21 activity. In this example, the point is there was gain
22 obtained between the two Super Powers, but some of that
23 may have come at the expense of an unrepresented group
24 of individuals.

25 MR. GIDLEY: No further questions.

1 JUDGE CHAPPELL: Any cross from Schering?

2 MR. NIELDS: Yes, some, Your Honor. May I pass
3 out binders?

4 JUDGE CHAPPELL: Yes, you may.

5 (Pause in the proceedings.)

6 JUDGE CHAPPELL: Mr. Nields, are you ready?

7 MR. NIELDS: I am, Your Honor.

8 JUDGE CHAPPELL: Go ahead.

9 CROSS EXAMINATION

10 BY MR. NIELDS:

11 Q. Good afternoon, Mr. Bazerman.

12 A. Good afternoon to you.

13 Q. You were asked, as I understand it, to render
14 an opinion, among other things, on the type of
15 settlement process that should be allowed between a
16 branded pharmaceutical monopolist and a generic
17 entrant. Is that correct?

18 A. That's correct.

19 Q. And in doing that, you were asked to assume
20 that the \$60 million that Schering paid Upsher for
21 licenses was excessive, correct?

22 A. That is correct.

23 Q. And complaint counsel asked you to assume that,
24 correct?

25 A. Correct.

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1 Q. And they did that at the beginning of your
2 work, correct?

3 A. They did.

4 Q. Now, they did more than just ask you to assume
5 it; they actually sent you the report of Dr. Levy,
6 correct?

7 A. They did send me the report of Dr. Levy.

8 Q. And you read that carefully?

9 A. I read that carefully.

10 Q. And you assumed that Dr. Levy's analysis was
11 correct.

12 A. Yes. I read it. It was a clear reading
13 document, but I basically was working on the -- on the
14 request of complaint counsel to assume that \$60 million
15 was excessive and that Dr. Levy's analysis was correct.

16 Q. And complaint counsel did not ever send you the
17 report of the Schering expert that evaluated the
18 licenses, true?

19 A. They did not send that to me.

20 Q. You never read Dr. Horovitz's report.

21 A. I did not.

22 Q. Because you never got it.

23 A. I never got it and never read it.

24 Q. And you also never read the testimony of Mr.
25 Audibert, the Schering person who evaluated Niacor.

1 A. No, I didn't.

2 Q. Because you never got that either.

3 A. I did not receive it.

4 Q. Complaint counsel didn't give it to you.

5 A. No, they didn't.

6 Q. And you never reviewed the testimony of Mr.

7 Lauda, the Schering executive that decided that the

8 licenses were worth \$60 million.

9 A. I did not review that.

10 Q. Because you never got it.

11 A. Never got it.

12 Q. Complaint counsel never sent it to you.

13 A. No, they didn't.

14 Q. In fact, you never read any of the testimony of

15 the Schering or Upsher people who negotiated the

16 settlement.

17 A. I did not.

18 Q. Because they never sent you that either.

19 A. They did not.

20 Q. And you let the complaint counsel decide what

21 materials you would have access to.

22 A. Generally I accepted the assignment that they

23 gave me, which was to critique Professor Mnookin and

24 Mr. O'Shaughnessy's report and talk about the

25 characteristics of an agreement, how it -- the

1 characteristics of an agreement could impact the
2 behavior of negotiators. I accepted the assignment
3 with the assumption that the \$60 million was excessive.

4 Q. So, in trying to get to your opinions about
5 what type of settlement process should be allowed
6 between a branded and a generic, you assumed, in
7 effect, that the Niacor license was a disguise,
8 correct?

9 A. Can you read back that question?

10 (The record was read as follows:)

11 "QUESTION: So, in trying to get to your
12 opinions about what type of settlement process should
13 be allowed between a branded and a generic, you
14 assumed, in effect, that the Niacor license was a
15 disguise, correct?"

16 THE WITNESS: My understanding of your question
17 is there's two parts, so in assessing the current deal,
18 I did assume that the \$60 million was excessive as
19 requested by the assignment. In commenting on the type
20 of negotiation processes that should be allowed, I
21 believe I went beyond that topic to talk about
22 characteristics of the process that would be likely to
23 lead pharmaceuticals to parasitically integrate in the
24 future, either due to corruption or due to self-serving
25 interpretations of what would be fair.

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1 BY MR. NIELDS:

2 Q. Actually, I only asked you one question, Mr.
3 Bazerman, and you still haven't answered it, so let me
4 try it again, okay?

5 In arriving at your opinions, you assumed, in
6 effect, that the Niacor license deal was a disguise.

7 A. I think the reason I had a problem with your
8 question is that I have offered many opinions. I've
9 offered opinions about the current settlement based on
10 the \$60 million assumption. I have also offered
11 opinions about the appropriate process.

12 Q. What I'm getting at, Professor, is whether you
13 not only assumed that the \$60 million was excessive but
14 that from that it meant that you assumed that it was a
15 disguise.

16 A. Well, the \$60 million was one piece of the
17 evidence, along with an unusual bundling, the lack of
18 due diligence, the excessive noncontingent payment in
19 comparison to the contingent payment.

20 Q. Try to lock in to the word "disguise," okay,
21 that's really what I'm asking about.

22 A. Um-hum.

23 Q. Did you write in your report, "In the specific
24 case, assuming the \$60 million was an excessive
25 payment," which you did assume, correct?

1 A. I did assume that.

2 Q. Okay, going on, "it is clear that the complex
3 settlement between Schering-Plough and Upsher-Smith was
4 a disguised strategy to keep Upsher-Smith's generic
5 product off of the market at the expense of consumers."

6 A. I did write this.

7 Q. Okay. Now, other than this settlement, have
8 you ever seen another settlement of a patent case
9 involving a simultaneous license?

10 A. No.

11 Q. So, in the only case that you knew of involving
12 a settlement of a patent dispute and a simultaneous
13 license, complaint counsel had you assume that the
14 license was a disguise.

15 A. No, complaint counsel asked me to assume that
16 the \$60 million was excessive, not that the payment was
17 a disguise.

18 Q. But based on that assumption, which you were
19 asked to make by complaint counsel --

20 A. Um-hum.

21 Q. -- it followed for you that it was a disguise.

22 A. When I added to the \$60 million being excessive
23 the lack of due diligence, the unusual bundling, the
24 surprisingly large amount of the payment that was
25 noncontingent, all of those factors led to my

1 conclusion of it being a disguise.

2 Q. Now, you've testified a bit today about
3 psychology, correct?

4 A. Correct.

5 Q. And you have some knowledge of that field.

6 A. I do.

7 Q. And, for example -- and you've testified about
8 biases.

9 A. I have.

10 Q. And you've said, for example, that
11 Schering-Plough in its negotiations might have had an
12 unconscious bias that it wasn't even aware of, correct?

13 A. I suggested that Schering-Plough may well have
14 had such a bias and that I would expect that firms in
15 general, under certain conditions, would exhibit that
16 bias.

17 Q. Could psychological factors bias you?

18 A. Absolutely. I do my best to use my literature
19 that I know very well to be as objective as possible
20 and to counteract those biases, but I don't believe
21 that there is a human who does not suffer from these
22 biases to some extent. I think that there are good
23 reasons why I think I'm less likely to be affected by
24 those biases than other people, but I wouldn't claim
25 that I'm a purely objective person. .

1 Q. And in fact, haven't you written in your own
2 book, quoting, "Perhaps one reason for my personal
3 interest in this materializes in my discomfort with the
4 fact that many of these 'evil biases' affect my own
5 personal judgment"?

6 A. I recall writing that for either the first or
7 second edition for the -- that would be the '86 or '90
8 edition, and I've always -- and I found these cognitive
9 puzzles fascinating for a long period of time. I think
10 that what helps hold my biases in check in this context
11 is that my awareness of these biases helps me take
12 appropriate steps to counteract those, and that's
13 something that I work hard on as a professional.

14 And in addition, many experts are in the
15 business of providing expert testimony. I fully expect
16 to be -- this to be the last time for quite a while
17 that I'm likely to serve in this purpose. So, I don't
18 have a self-serving bias of pleasing my client for more
19 work. I have little expectation of such work.

20 Q. I wasn't getting at that type of bias. I want
21 to see if I understand. I mean, the complaint counsel
22 asked you to assume, in the only case you know of
23 involving a patent settlement and a side license, that
24 there was an excessive payment for the side license.

25 A. Right.

1 Q. Right?

2 And then they asked for your views about patent
3 settlements with side licenses, right?

4 A. Um-hum.

5 Q. Don't you think that's sort of -- that that
6 would tend to bias your opinion?

7 A. I would hope not. Remember when I -- when I
8 took this assignment, I knew that my work included
9 reviewing and probably being on the other side of this
10 case from my friend and colleague Professor Mnookin.
11 So, I don't see great reason to assume that I would
12 have a vested stake in reaching a conclusion that was
13 specifically in the direction of complaint counsel.

14 Q. I wasn't asking you about a vested stake,
15 Professor. I was asking you the following proposition:

16 You're going to give an opinion about what
17 should be allowed in connection with settlements of
18 patent cases involving side deals, and complaint
19 counsel finds out you know of only one such settlement
20 in the history of the world. You have only one example
21 of a settlement like that. It's this case. And they
22 ask you to assume that the side deal was an excessive
23 payment.

24 A. They did. They asked me to assume that, and
25 they asked me to work with the other details of the

1 case to reach my conclusion on whether or not this is
2 appropriate and what impact it would have on consumers.

3 Q. Well, let me ask you this: You've talked about
4 framing.

5 A. Um-hum.

6 Q. Remember that?

7 A. I do.

8 Q. And as I understand it, the concept here is
9 that you could actually ask a group of -- two groups of
10 people the same question, but you might frame the
11 question one way for one group and frame it another way
12 for the other group, and you would expect to get
13 different answers.

14 A. Correct.

15 Q. Now, here's a hypothetical:

16 Suppose complaint counsel, instead of finding
17 one Max Bazerman, they found ten Max Bazermans, okay?

18 A. Um-hum.

19 Q. And they decided to ask them all the same
20 question, okay? And the question is, what should the
21 policy be with regard to patent settlements with side
22 licenses, except they put them into two groups of five.
23 Are you with me so far?

24 A. I am.

25 Q. So, five Max Bazermans in one room and five Max

1 Bazermans in the other.

2 A. That's too many Max Bazermans.

3 Q. No, we like Max Bazermans here. It's the last
4 day of the trial, and we're happy to have him here.

5 But they frame the question differently to the
6 two groups of the five Max Bazermans, okay, and here
7 I'm going to tell you how they framed the question to
8 the first group.

9 The first group they say, there is only one
10 known example of a patent settlement with a side
11 license, and they say, in that case, the brand name
12 company paid fair value to the generic. They reached a
13 fair settlement. Without the license, the settlement
14 might not have been possible. And because of the
15 settlement, there was saved expenses, uncertainty was
16 removed for both companies, each company was able to
17 plan more efficiently, and the generic launch was a
18 whopping success when it happened, because they were
19 able to build a new plant and way more pills to launch
20 with. Okay, that's how they framed the issue to one
21 group of Max Bazermans.

22 In the other room, the other group of Max
23 Bazermans was told what you were told. They were told
24 there's only one known example of a patent settlement
25 with a side license. In that case, the brand name paid

1 an excessive amount for the license, and it was a
2 disguised payment to get the generic to agree to delay
3 at the expense of consumers.

4 Now, here's my question -- have you got that?

5 A. I do, but I don't agree with the premise that
6 the second --

7 Q. Well, just take my hypothetical, all right?
8 Just take that as the hypothetical.

9 A. Well, but I want to clear up what part I can
10 accept. I don't hear the complaint counsel -- I don't
11 view the complaint counsel as having created the second
12 version, so we're in disagreement only on the part
13 where you implied that the second version is what I
14 actually heard. There were multiple pieces that I
15 don't concur with.

16 Q. Okay, but you're going to take my hypothetical,
17 okay?

18 A. Your two hypotheticals, eliminating which one
19 is the current story.

20 Q. Yes, because we already know the current story,
21 because that's in the record.

22 Would you expect the two different groups of
23 Max Bazermans to come up with two different opinions?

24 A. About the current deal or the appropriate rule
25 that -- or the characteristics of the rule that would

1 be appropriate to govern such situations?

2 Q. Characteristics of the appropriate rule to
3 govern such situations.

4 A. I would hope, and I'm reasonably confident,
5 that the ten Max Bazermans would sort out the facts and
6 think through the process in answering what kinds of
7 agreements in general would be created based on
8 different characteristics of the law. So, I would -- I
9 hope and expect that I -- that you'd get a similar
10 answer on the recommended resulting process, but I
11 started off by saying I'm not a perfectly unbiased
12 person, so I'm open to the fact that I could be
13 marginally different in the strength of my views based
14 on those two presentations.

15 Q. Now, didn't I hear you -- aren't you familiar
16 with examples where two people in two rooms were told
17 that there are 600 people, and in one room they were
18 told 200 would die and the other room they told 400
19 would live, and the two groups of people couldn't
20 tell -- couldn't -- came up with different answers even
21 though it was exactly the same information?

22 MR. KADES: Objection, Your Honor, I believe
23 this question goes to the proffered part of the
24 testimony.

25 MR. NIELDS: I'll withdraw it.

1 BY MR. NIELDS:

2 Q. Now, you talk about several types of bias in
3 your book, don't you?

4 A. I do.

5 Q. Now, you've got one that -- you talk about
6 biases emanating from anchoring an adjustment. Do you
7 recall that?

8 A. Uh-huh.

9 Q. And one of those is over-confidence. Do you
10 recall that?

11 A. Um-hum.

12 Q. And you say, "Individuals tend to be
13 over-confident of the infallibility of their judgments
14 when answering moderately to extremely difficult
15 questions."

16 Do you see that?

17 Do you believe that that's a -- that's a bias
18 that human beings are susceptible to?

19 A. I do.

20 Q. Ever met Dr. Levy?

21 A. I've never met Dr. Levy.

22 Q. Now, then there's another one that says, "Two
23 more general biases. The confirmation trap is one of
24 them."

25 A. Um-hum.

1 Q. Do you remember that?

2 A. I do.

3 Q. And you say, "Individuals tend to seek
4 confirmatory information for what they think is true
5 and fail to search for disconfirmatory evidence."

6 Do you see that?

7 A. Yes. Well, I don't see it, but I -- I know the
8 work.

9 Q. Is that a bias that human beings are prone to?

10 A. Yes.

11 Q. Are you sure you don't know Dr. Levy?

12 A. I'm virtually sure I don't know Dr. Levy.

13 Q. Now, you also have a bias called the
14 representativeness heuristic.

15 A. Heuristic.

16 Q. Heuristic?

17 A. Yes. Heuristic means rule of thumb.

18 Q. Okay. And an example is insensitivity to
19 sample size, correct?

20 A. Um-hum, yes.

21 Q. So, that would apply like in a case where a
22 person is given one example and then generalizes from
23 that, yes?

24 A. It's more commonly illustrated that people have
25 a sample rather than a data point and that people

1 aren't very good at paying attention to whether the
2 sample size was 10 or 1000. I don't recall empirical
3 work looking at how people respond to a data point as
4 opposed to a small sample.

5 Q. Here the only -- the one sample you had was the
6 Schering-Upsher deal, and you were asked to assume that
7 Schering overpaid for the license, correct?

8 A. I was asked to assume that the \$60 million
9 payment was excessive for the licenses obtained.

10 Q. And we've already established that you know
11 only one example of a patent settlement with a side
12 license, and that's this case, right?

13 A. I do not know of any other example, which I --
14 for me speaks to the fact that it's quite unusual.

15 Q. Now, on the basis of one example, you were
16 asked to speculate about the impact of such settlements
17 on future antitrust behavior, correct?

18 A. Um-hum, to offer opinions about what my
19 expertise tells me about how future negotiators would
20 behave.

21 Q. Well, you were asked to speculate about that,
22 right?

23 A. I don't recall the word "speculate." I was
24 asked to analyze.

25 Q. Speculate.

1 MR. KADES: Objection, Your Honor,
2 argumentative and asked and answered.

3 MR. NIELDS: I don't think I got a question out
4 yet.

5 JUDGE CHAPPELL: Well, there's the word
6 "speculate" with a Q beside it. Susanne thought it was
7 a question.

8 MR. NIELDS: It wasn't intended to be.

9 JUDGE CHAPPELL: So, there is no question.

10 BY MR. NIELDS:

11 Q. You did testify earlier about psychology,
12 right?

13 A. Yes, I did.

14 Q. Have you ever heard of something called a
15 Freudian slip?

16 A. I've heard of it.

17 Q. That's when somebody says something true
18 without meaning to say it?

19 A. We're in the realm of clinical psychology, and
20 most of Freud's work hasn't been well validated, so I
21 am going to avoid offering expertise on Freud.

22 Q. Well, would the dictionary be familiar enough
23 to you? How about it's a slip of the tongue that
24 reveals some unconscious aspect of the mind?

25 A. I'm willing to accept that as what the

1 dictionary says.

2 Q. And here we've got a little quotation from your
3 deposition, and isn't it true that you said:

4 "My testimony really was, I was asked to focus
5 on the two settlement expert reports, and I responded
6 to the special features of those reports that I was in
7 disagreement with, and I was asked to speculate on
8 the -- to not speculate -- I was asked to analyze the
9 impact of the kind of settlement that we're observed on
10 future antitrust behavior."

11 A. I -- I accept this as my words and that I used
12 the word "speculate" and I didn't recall that specific
13 record from those specific lines.

14 Q. That was a slip of the tongue, right?

15 A. I'm not reaching a clinical conclusion.

16 JUDGE CHAPPELL: He's not going to diagnose
17 himself, right?

18 MR. NIELDS: Apparently not, Your Honor.

19 BY MR. NIELDS:

20 Q. So, it was on purpose you said that?

21 A. Just now?

22 Q. Just then. Speculate.

23 A. I saw the word "speculate." What did I say?

24 Q. Well, I guess my question was, did you -- when
25 you said that in your deposition, did you say it on

1 purpose?

2 A. I -- I would assume that my behavior was
3 intentional in the deposition.

4 Q. Okay. Now, Professor, would this statement be
5 true, that when the rules are unclear -- I think you
6 testified about ambiguous rules --

7 A. Um-hum.

8 Q. -- applying to behavior so that there is not an
9 absolute -- absolute bright line between what's lawful
10 and what's unlawful. Isn't it possible that one
11 response that people would have to such a circumstance
12 is to steer a wide berth around any possible violation
13 of the law?

14 A. It's certainly possible that some individuals
15 or organizations would be very concerned about
16 violating ambiguous laws.

17 Q. But you don't know -- you've never tested or
18 done any studies or research on how that would apply to
19 a patent settlement, do you?

20 A. I have not -- I have not conducted any specific
21 empirical work in the patent settlement domain on that,
22 no.

23 Q. Now, you've testified about a self-serving
24 bias.

25 A. Um-hum.

1 Q. Do you recall that?

2 A. I do.

3 Q. And you said that it might impact the way
4 Schering would negotiate a patent settlement with
5 Upsher. Do you recall that?

6 A. Um-hum.

7 Q. Now, were you aware of the testimony of Mr.
8 Audibert that he was the one who projected the likely
9 sales of the Niacor product that Schering licensed in?

10 A. I'm not aware of that testimony.

11 Q. And so you're not aware that he testified that
12 he was personally unaware that there was a patent suit
13 when he did that projection?

14 A. I'm not aware of the material you're presenting
15 right now.

16 Q. Now, you know Professor Mnookin, don't you?

17 A. I do.

18 Q. And you work in the Project on Negotiation at
19 Harvard?

20 A. Program on Negotiation, yes.

21 Q. Program, excuse me, Program on Negotiation.

22 A. Um-hum.

23 Q. And does he have a position in that program?

24 A. Yeah, he's the head of the board.

25 Q. Of the whole program?

1 A. Yeah, so he's the head of the executive
2 committee; I'm a member of the executive committee.
3 There are three pieces coming out of the executive
4 committee, which I head one of those.

5 Q. Now, you were asked to rebut -- what do you
6 think of him, by the way?

7 A. I think highly of Professor Mnookin.

8 Q. Now, you were asked to rebut Professor Mnookin
9 and Mr. O'Shaughnessy's reports, correct?

10 A. Correct.

11 Q. Now -- and their testimony as well, correct?

12 A. Their testimony as --

13 Q. You're in here rebutting their testimony,
14 correct?

15 A. I believe that that's correct.

16 Q. And isn't it true that neither one of them
17 testified in favor of side deals in which there was net
18 consideration flowing to the generic company, did they?

19 A. Well, I read both of their expert reports and
20 their testimony as ringing endorsements of creative
21 deals that expanded -- of creative deals that created
22 value for the two parties at the negotiation table, and
23 much of my rebuttal had to do with that depends on
24 whether it's parasitic at the expense of consumers or
25 not.

1 Q. And you understand it, don't you, Professor,
2 you understand it to be Professor Mnookin's analysis
3 that by doing a deal that helps create mutual gain
4 outside the settlement issues, that that fact may
5 facilitate settlement?

6 A. Yes, and I agree with that.

7 Q. And you understand Mr. Mnookin to be talking
8 about trades that create value for both parties?

9 A. I do.

10 Q. And you agree that settlement is promoted when
11 parties can find value-creating trades outside the
12 immediate scope of the original dispute?

13 A. I do.

14 Q. And that is because to the extent that you can
15 add issues to the table that allow both sides to be
16 better off than what the deal would look like without
17 that issue added to the table, there is more value to
18 be gained; therefore, the parties are likely to be
19 happier with the settlement and an agreement is more
20 likely to occur?

21 A. There's more value to be deemed by those two
22 parties, yes.

23 Q. Okay. You agree with that statement?

24 A. Yes.

25 Q. And Professor Mnookin's point is that trades

1 ought to be looked at as a way of helping to settle a
2 case.

3 A. Absolutely.

4 Q. Now, your research has shown that judgment in
5 negotiation frequently does deviate from economic
6 models.

7 A. Correct.

8 Q. And is it true that there is a large body of
9 behavioral decision research showing that individuals
10 involved in negotiation often deviate from the economic
11 model of rationality?

12 A. Yes.

13 Q. And is that true of expert negotiators as well
14 as naive negotiators?

15 A. Yes.

16 Q. And is it true that the outcomes of
17 negotiations are frequently not fully consistent with
18 the predictions of rational models?

19 A. That is correct.

20 Q. And do psychological factors enter into it?

21 A. Yes.

22 Q. And you show, I take it, and believe and have
23 written that psychological factors do enter into
24 negotiations and cause parties to reach outcomes that
25 are not consistent with rationality?

1 A. Correct.

2 Q. And are not entirely predictable?

3 A. Well, I'm not going -- no, I don't agree with
4 that last comment in the sense that the behavioral
5 literature does a good job of trying to predict
6 systematically how outcomes will deviate from
7 rationality. So, I think that they are predictable in
8 their departures from economic models.

9 Q. Now, I'm going to put up a picture of two
10 circles.

11 A. Um-hum.

12 Q. We've seen this many, many times before in this
13 case, Professor, and I won't dwell on them long. The
14 left-hand one is one that pictures competition,
15 correct?

16 A. Correct.

17 Q. And consumers' expected savings that come from
18 it, right?

19 A. That's right.

20 Q. And that's why it's got the blue there, right?

21 A. I didn't pick the color, so I'm not sure why
22 the blue is there.

23 Q. Well, people who pick the colors always put
24 blue when they like it.

25 A. I didn't know that, but I appreciate the

1 information.

2 Q. For this case only. The red is bad. That's
3 what we don't like. We like the blue, right?

4 A. I'm not going to endorse your color plan.

5 Q. Well, on this chart you like the blue.

6 JUDGE CHAPPELL: For the record, are you
7 talking about the Carolina blue?

8 THE WITNESS: I see the blue as representing
9 the interests of consumers who aren't at the table.

10 BY MR. NIELDS:

11 Q. We like that, right?

12 A. I don't have any great need to put an affect
13 with that. I think the Court should help create an
14 environment in which the overall societal welfare is
15 considered.

16 Q. Including the blue?

17 A. Including the blue, absolutely.

18 Q. Okay. I mean, you don't dislike the blue, do
19 you?

20 A. I don't have anything against the blue.

21 Q. Okay.

22 A. I -- no, but I actually don't as a general rule
23 dislike incumbents or entrants either.

24 JUDGE CHAPPELL: I think we have got enough
25 about the blue, Mr. Nields, if we can --

1 MR. NIELDS: Okay, I'm off the blue, Your
2 Honor.

3 BY MR. NIELDS:

4 Q. Professor, do you happen to know in the case of
5 potassium chloride supplements whether we are
6 experiencing today the circle without the blue or the
7 circle with the blue?

8 A. As of 2002?

9 Q. As of today, I think that's clear enough.

10 A. I don't know. My understanding is that -- is
11 that the entrant has entered, so I would expect that
12 the consumer has received some benefits today in
13 comparison to before the generic entered that would
14 give them some benefit, but whether this is an accurate
15 depiction of the current state and whether the
16 different -- the three pieces are appropriate size or
17 not, I don't know the answer to that.

18 Q. Okay. Well, forget the sizes. You do
19 understand that the generic manufacturer is on the
20 market with a product that competes with Schering's.

21 A. That's my understanding.

22 Q. And is it your understanding that that is true
23 today because of the settlement?

24 MR. KADES: Objection, Your Honor, that goes
25 beyond the scope of the witness' expertise. He's

1 asking him for an opinion that an IO economist would
2 give.

3 MR. NIELDS: I think it's common sense.

4 JUDGE CHAPPELL: I'll allow you to ask
5 questions regarding his opinion since he talked about
6 these exhibits in the direct. So, to that extent,
7 you're overruled.

8 THE WITNESS: Can I have your question again,
9 please?

10 (The record was read as follows:)

11 "QUESTION: And is it your understanding that
12 that is true today because of the settlement?"

13 THE WITNESS: I view what sounds like a simple
14 question to be a complex question, because it's my
15 understanding that there was a settlement that
16 specified the entry date. We don't know what would
17 have happened absent that agreement, so I need to know
18 what the world would have looked like without the
19 settlement to appropriately answer your question.

20 BY MR. NIELDS:

21 Q. To do that, you would have to know who would
22 have won the patent case, right?

23 A. Who would have won the patent case or how it
24 would have been settled without the side deal.

25 Q. But as it is today under the settlement, we

1 know there's competition, correct?

2 A. We know that there's competition today.

3 Q. Yes. And without the settlement, we don't know
4 whether there would be competition or not.

5 A. I -- I do not know. So, different results
6 would affect the size of the blue.

7 MR. NIELDS: I have nothing further, Your
8 Honor.

9 JUDGE CHAPPELL: Redirect?

10 MR. KADES: Your Honor, we have no questions on
11 redirect.

12 JUDGE CHAPPELL: Thank you, Dr. Bazerman.
13 You're excused.

14 THE WITNESS: Thank you.

15 JUDGE CHAPPELL: We're going to take an
16 afternoon break, and then I am going to come back and
17 we will tie up some loose ends on this, our last day of
18 trial.

19 Actually, before I assume that, do the
20 respondents intend to move to call any witnesses?

21 MR. NIELDS: No, Your Honor.

22 JUDGE CHAPPELL: Well, before I ask you that,
23 to be fair, anything else from complaint counsel?

24 MS. BOKAT: Your Honor, there is still a few --

25 JUDGE CHAPPELL: I mean witnesses.

1 MS. BOKAT: No witnesses, Your Honor, thank
2 you.

3 JUDGE CHAPPELL: Okay, we will get to that few
4 whatever after the break, okay?

5 MS. BOKAT: Fine, thank you.

6 JUDGE CHAPPELL: I didn't mean to cut you off,
7 but that's why we're coming back.

8 No further witnesses from the Government, so
9 with that, do the respondents move to call anyone else?

10 MR. CURRAN: No further witnesses from
11 Upsher-Smith, Your Honor.

12 MR. NIELDS: No further witnesses from
13 Schering, Your Honor.

14 JUDGE CHAPPELL: Okay, we are going to take a
15 recess until 2:50, 2-5-0.

16 (A brief recess was taken.)

17 JUDGE CHAPPELL: The court reporter has asked
18 that I inform you that you need to provide to her a
19 complete list of every exhibit you've marked, a list,
20 whether offered or otherwise as soon as possible.

21 I'm going to rule on this pending motion to
22 dismiss at this time. Pending before me is
23 Upsher-Smith's motion to dismiss due to complaint
24 counsel's failure to establish a prima facie case.
25 Schering-Plough has joined in that motion.

1 We have an odd rule, 3.22, that says, "When a
2 motion to dismiss is made at the close of the evidence
3 offered in support of the complaint based upon an
4 alleged failure to establish a prima facie case, the
5 ALJ may defer ruling thereon until immediately after
6 all evidence has been received and the hearing record
7 is closed." I just wanted to point out that's what the
8 rule says.

9 I have gone through, I have reviewed the
10 pleadings, considered the oral argument -- and by the
11 way, Upsher -- procedurally, Upsher filed a leave to
12 file a reply brief and a reply brief. I did consider
13 that reply brief, but I didn't need the Government to
14 respond as will be apparent shortly.

15 I have decided that on all the issues raised by
16 respondents at this point -- actually, at the point in
17 trial when the Government rested, I find that at least
18 a modicum of evidence exists sufficient to create
19 factual issues of dispute which defeat the motion to
20 dismiss.

21 I'm not saying the arguments raised were not
22 good. I'm saying that under the standard for motion to
23 dismiss, it's denied in its entirety.

24 Any questions?

25 MR. CURRAN: No questions, Your Honor, thank

1 you.

2 MR. NIELDS: No, Your Honor.

3 MS. BOKAT: No, Your Honor.

4 JUDGE CHAPPELL: Okay, back to my list of
5 things to do, and then we'll get to your agenda, Ms.
6 Bokat. This could be the time. I'm looking for a
7 status on the exhibits you mentioned yesterday or
8 whatever day it was.

9 MS. BOKAT: May Mr. Meier address that issue,
10 Your Honor?

11 JUDGE CHAPPELL: Yes.

12 MR. MEIER: Your Honor, we're still working out
13 an agreement, and we think we'll probably come to
14 agreement on most of the few remaining exhibits, it's
15 not too many, but we're hoping to address the Court
16 before the case is closed on that issue.

17 JUDGE CHAPPELL: Okay. Does it appear that
18 we're going to have some objections or is it too
19 soon -- the reason I ask is, I want to get together one
20 day before or at least maybe two days before to take
21 time to consider this one last offer, so I guess what
22 I'm saying is I need to know the parties' feelings on
23 whether you're going to work this out or not.

24 Are you far enough along to let me know your
25 degree of confidence on that?

1 MR. MEIER: My best guess is that there will be
2 an objection to two documents that the Government is
3 trying to move in, and there may be some reason to
4 discuss those two documents. That's my best guess
5 standing here today.

6 MS. SHORES: I agree with that prediction. I'm
7 not sure that we can't work it out, but there's a
8 significant possibility that we won't with respect to
9 these two documents.

10 JUDGE CHAPPELL: Okay. Mr. Curran, do you
11 concur with Ms. Shores?

12 MR. CURRAN: I agree with both complaint
13 counsel and Schering, yes.

14 JUDGE CHAPPELL: I was thinking about the
15 outstanding offers of proof, and there is actually no
16 way those can be admitted unless I'm here and the court
17 reporter's here, so we are going to have to get
18 together for that in any event, but I -- but my
19 intention is to hear the objections, to consider this
20 so I don't need to do this -- I don't plan on the last
21 get-together to be a very lengthy hearing.

22 So, perhaps someone should send me a letter
23 regarding these exhibits, regarding the disputed
24 exhibits. It can be a joint letter or you can each
25 file your own letter. You know, these are what we're

1 offering and that are disputed, this is why we're
2 objecting, and when I get that, I'll decide whether we
3 need to have a hearing. So, be prepared to come in
4 here Tuesday afternoon briefly.

5 Some other thoughts on the transcript and the
6 record. I understand that there are -- 3.44 allows me
7 to expressly accept transcript changes after I've
8 closed the evidentiary record; however, I like to get
9 those things cleaned up beforehand if at all possible.
10 That's why I'm giving everyone a few days to look over
11 the transcript and to look over exhibits so that when I
12 close the record, hopefully that's all been taken care
13 of.

14 With that in mind, I am going to set Thursday
15 as the date that I'm going to close the record and the
16 date that we'll get together, let's say 2:00 on
17 Thursday, and that is, I believe, March 28th, 2:00 p.m.
18 I'm going to be issuing a written order stating that I
19 am closing the record on that date. The order is also
20 going to contain a briefing schedule which I'm going to
21 tell you now, so you're not surprised.

22 I'm keying off of today, and I wanted to give
23 everybody at least three weeks from today to file your
24 briefs, so what I've done is I've set Monday, April
25 15th as the deadline, which is three weeks and a

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1 weekend from today. Hopefully you'll have your taxes
2 done and out of the way. I understand April 15th is
3 not a red letter day, especially for me, but does
4 anyone feel that April 15th is insufficient time? You
5 had suggested April 18th.

6 MR. CURRAN: We can live with that, Your Honor.

7 MR. NIELDS: Likewise.

8 MS. BOKAT: Yes, Your Honor.

9 JUDGE CHAPPELL: Okay. For the reply briefs,
10 you had requested the 29th. I have modified that to
11 the 25th, which cuts a few days off; however, your date
12 was on a Monday. Does anyone feel the 25th is
13 insufficient time to file your replies?

14 MS. BOKAT: No, Your Honor.

15 MR. CURRAN: Upsher does not have a problem,
16 although I have a recollection that Mr. Nields had an
17 argument around that time frame that affected the
18 parties' joint proposal to the Court.

19 MR. NIELDS: I have an argument in the 11th
20 Circuit, Your Honor, which will be that week, in other
21 words, the week of the 22nd. The particular date
22 hasn't been set yet, but the reason we had all agreed
23 on the 29th was I was worried that that's going to be
24 at least a day of preparation and a day of argument,
25 intense, and I will be out of town. I would hate to

1 have this very important document filed either the day
2 after I get back or while I'm doing that.

3 It's not that it can't be done, and if the
4 Court wishes that to be the date, I'll find a way to
5 make it happen, but that was the reason we had picked
6 the 29th.

7 JUDGE CHAPPELL: Well, my reasoning was the
8 parties had offered May 1st as the date for argument on
9 these briefs, which is in effect the closing argument,
10 and I need some time to review the reply briefs. You
11 were giving me, if they are filed at 5:00 p.m. on the
12 29th, one day. That's the reason I was moving it back
13 somewhat, to give me more time.

14 What if I -- what about the 26th, that Friday?

15 MR. NIELDS: That's better.

16 JUDGE CHAPPELL: Then I'm going to -- I'll set
17 it the 26th. I need to have some time, and I don't
18 want to push the argument any later than it's set at
19 this time. So, I'm just telling you so you don't get
20 surprised when the order comes out next week, so that
21 the briefs will be due on the 15th, the reply briefs on
22 the 26th, and oral argument will be at 1:30 p.m. in
23 this room hopefully May 1st.

24 And remember, I strongly suggest in your reply
25 brief you address arguments in the order they were

1 presented in the brief you are replying to. Any
2 questions on briefs?

3 MS. BOKAT: No, Your Honor.

4 MR. CURRAN: Your Honor, I take it when you say
5 respond to the other side's briefs, are you including
6 the findings of fact as well as the conclusions of law
7 in the briefs?

8 JUDGE CHAPPELL: Yes.

9 MR. CURRAN: Okay, very good, thank you.

10 JUDGE CHAPPELL: It's a lot more efficient and
11 a lot easier for me to consider your reply when you --
12 I know, a lot of people are under the theory that I'm
13 not going to let the other side set the agenda, but it
14 was their brief. The agenda is already set by them. I
15 understand there's the school of argument that that's
16 not how it works, but I'm merely telling you the way
17 that I like to read reply briefs.

18 JUDGE CHAPPELL: Anything further?

19 MS. BOKAT: Not from complaint counsel, Your
20 Honor.

21 MR. CURRAN: Your Honor, just on account of
22 this being the last day of trial, perhaps you'll
23 indulge me. I'd like to on behalf of Upsher-Smith and
24 White & Case and my colleagues state that it's been a
25 pleasure to have this trial. My compliments to counsel

1 for -- the complaint counsel and for Schering. We
2 express our gratitude to the Court for being patient
3 with the lawyers throughout the case, and perhaps a
4 special tip of the hat to Susanne Bergling who has done
5 a terrific job from start to finish.

6 JUDGE CHAPPELL: I agree, Susanne's been a real
7 trooper, as has everyone involved, and I'd like to
8 extend my appreciation to everyone for being at most
9 points during the trial very civil toward everyone
10 involved. It's been a long, strange road. I think
11 it's coming to an end.

12 With that, I expect, like I say, a letter, some
13 status on whether we need to get together before
14 Thursday. If I don't hear anything otherwise, then we
15 will reconvene on Thursday at 2:00 p.m. We're
16 adjourned.

17 (Whereupon, at 3:10 p.m., the hearing was
18 adjourned.)

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25

1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: MARCH 22, 2002

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 3/25/02

13

14

15

16 SUSANNE BERGLING, RMR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

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